TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1917

No. 156

J. C. EDGAR, J. M. GIBSON, H. V. HOOVER, and [illegible]

vs.

T. H. EWELL, J. L. STOVER, LOUIS A. [illegible], et al.

ERROR TO THE SUPREME COURT OF THE [illegible]

FILED [illegible]

(18,401.)

(20,461.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907.

No. 156.

J. G. BOGARD, J. H. SIMPSON, H. Y. HOOVER, ET AL., APPELLANTS,

vs.

F. H. SWEET, J. L. SWEET, LEONA S. HERD, ET AL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

INDEX.

	Original.	Print.
Caption	*a*	1
Citation and service	*b*	1
Petition for appeal	1	2
Assignment of errors	2	3
Affidavit of value	4	4
Order allowing appeal	5	5
Bond on appeal	6	5
Petition in error	8	7
Case-made from district court of Greer county	10	8
Petition	11	9
Exhibit A—Deed, H. C. Sweet *et ux.* to Mangum Star Printing and Publishing Association, acknowledged February 10, 1891	20	14
Exhibit B—Agreement, J. G. Bogard *et al.* with H. C. Sweet *et ux.*, December 10, 1890	24	16
Disclaimer of H. M. Ferguson	28	18
O. P. Elliott	28	18
F. B. Duke	29	19
G. H. Eubank	29	19
R. C. Hannah	30	19

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 12, 1907.

	Original.	Print.
Testimony of George L. Allen	31	20
G. W. Lynch	32	20
S. H. Tittle	33	21
W. L. Pendergraft	35	21
M. E. Clark	36	22
Demurrer	37	22
Suggestion of death of H. C. Sweet, &c.	38	23
Order reviving cause and ruling on demurrer	39	23
Answer	40	24
Application to restore lost records	42	25
Proceedings at hearing	44	26
Testimony of O. P. Elliott	44	26
G. H. Eubank	49	30
R. C. Hannah	52	31
S. H. Tittle	56	34
H. M. Ferguson	58	36
R. C. Hannah (recalled)	60	37
Plaintiffs rest	62	39
Demurrer to evidence	63	39
Testimony of L. J. Edwards	64	39
J. H. Simpson	72	45
G. S. Huling	80	50
Defendants rest	86	53
Testimony of R. C. Hannah	86	54
Testimony of H. M. Ferguson (recalled)	87	55
Plaintiffs rest and case closed	88	55
Stenographer's certificate	89	55
Exhibit A—Receipt to R. C. Hannah, November 26, 1890	90	56
B—Receipt to E. R. Fletcher, November 22, 1890.	90	56
C—Receipt to H. M. Ferguson, Nov. 26, 1890	90	56
D—Receipt to O. P. Elliott, November 26, 1890	91	56
E—Receipt to E. A. Winkler, November 26, 1890.	91	56
Motion for new trial	93	57
Judgment	96	58
Attorneys' certificate to case-made	100	60
Judge's certificate to case-made	103	61
Argument and submission	105	61
Orders granting leave to file additional briefs	106	62
Judgment	108	62
Opinion	109	63
Clerk's certificate	111	65

a No. 1623.

J. G. BOGARD ET AL., Plaintiffs in Error,
vs.
F. H. SWEET ET AL., Defendants in Error.

Appeal to the Supreme Court of the United States from the Supreme Court of the Territory of Oklahoma.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to F. H. Sweet, J. L. Sweet, Leona S. Herd, Lucy S. Wilson, Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet, Emory Sweet, and A. W. Putnam, as Guardian of Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet, and Emory Sweet, defendants in error, and Garrett & Garrett and C. M. Thacker, their attorneys, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, within thirty days from the date of this writ, pursuant to the appeal duly allowed and filed in the Clerk's office of the Supreme Court of the Territory of Oklahoma, in a cause wherein J. G. Bogard, J. H. Simpson, H. Y. Hoover, L. J. Edwards, G. S. Huling, S. C. VanLeer, J. A. Powers, M. C. Logan, *pro se* and as the mother and next friend of Addie V. Logan, and James W. Logan, minor heirs of J. W. Logan, deceased, Belle Pendergraft, *pro se* and as mother and next friend of Claud D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Lillie V. Pendergraft, Isom P. Pendergraft and William Pendergraft, minor heirs of I. L. Pendergraft, deceased, are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 25th day of October, A. D., 1906.

[Seal Supreme Court, Territory of Oklahoma.]

B. F. BURWELL.
Associate Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER, *Clerk.*

c Service of the within and foregoing citation is hereby acknowledged by the delivery to us of a true and complete copy thereof this 3rd day of November, A. D., 1906.

GARRETT & GARRETT,
CHAS. M. THACKER,
Attorneys for Defendants in Error.

[Endorsed:] No. 1623. J. G. Bogard *et al.*, plaintiffs in error, *vs.* F. H. Sweet *et al.*, defendants in error. Citation and proof service thereof. Filed Nov. 6, 1906. Benj. F. Hegler, Clerk Supreme Court.

1 In the Supreme Court of the Territory of Oklahoma.

No. 1623.

J. G. BOGARD, J. H. SIMPSON, H. Y. HOOVER, L. J. EDWARDS, G. S. HULING, S. C. VANLEER, J. A. POWERS, M. C. LOGAN, *pro se* and as the Mother and Next Friend of Addie V. Logan and James W. Logan, Minor Heirs of J. W. Logan, Deceased; BELLE PENDERGRAFT, *pro se* and as Mother and Next Friend of Claud D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Lillie V. Pendergraft, Isom P. Pendergraft, and William Pendergraft, Deceased, Plaintiffs in Error,

vs.

F. H. SWEET, J. L. SWEET, LEONA S. HERD, LUCY S. WILSON, ALBERT ORLANDO SWEET, MYRA E. SWEET, JOSEPH L. SWEET, LUCY SWEET, EMORY SWEET, and A. W. PUTNAM, as Guardian of Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet, and Emory Sweet, Defendants in Error.

Petition for Allowance of Appeal to the Supreme Court of the United States.

The above named plaintiffs in error, conceiving themselves aggrieved by the judgment and decrees made by the said Supreme Court of the Territory of Oklahoma, and entered on the 6th day of September, 1906, in the above entitled cause, do hereby appeal from the said judgment and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is hereto attached and filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, papers and proceedings upon which said judgment and decree were made, duly authenticated, may be sent to the said Supreme Court of the United States.

JOHN W. SHARTEL,
J. R. KEATON,
FRANK WELLS,
Attorneys for Pl'ffs in Error.

Filed Oct. 20, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court.

2 In the Supreme Court of the Territory of Oklahoma.

No. 1623.

J. G. BOGARD ET AL., Plaintiffs in Error,
vs.
F. H. SWEET ET AL., Defendants in Error.

Assignment of Errors on Appeal.

Comes now the plaintiffs in error in the above entitled action and file the following assignment of errors in connection with, and in support of, their petition for allowance of appeal and upon which they will rely:

1st. The Supreme Court of Oklahoma erred in deciding that: "Where S purchases from the State of Texas land in what is now Greer County, Oklahoma, and plats the same as a portion of the townsite of Mangum, and thereafter enters into a contract with certain persons for the establishment of a newspaper, wherein it is agreed that such persons shall form a corporation, and run said newspaper and sell S's townsite property, and collect certain notes held by him, paying two-thirds of all amounts received to said S, themselves retaining one-third; and where S, in pursuance of said contract, as a matter of convenience, executes and delivers to such persons a warranty deed to said land, and such corporation is never formed, but the project is abandoned, and the deed, together with the notes returned to S, *Held*, That S in such case is entitled to a decree cancelling such contract, and the deed executed thereunder."

2nd. The said Court erred in holding and deciding in effect that the return of a warranty deed, duly executed, delivered and recorded, by one of the grantees therein to the grantor upon an understanding between such grantee and said grantor that the principal object for which the deed was executed had failed, re-invested the grantor with the equitable title to the land described in such deed.

3 3rd. The said court erred in holding and deciding in effect that the grantees in said deed were merely the agents of the grantor for the purpose of selling the real property therein described and without any beneficial interest in the title thereto.

4th. The said court erred in not deciding the principal propositions urged by counsel for plaintiffs in eror as grounds for reversal of the judgment of the trial court and in holding that said questions so urged "have no application to the facts in the case, or to any rule that should govern the court in its decision."

5th. The said court erred in not holding and deciding that the grantor in a deed is estopped to deny the consideration expressed therein, for the purpose of defeating the conveyance.

6th. The said Court erred in not reversing the judgment of the

trial court with directions to enter judgment in favor of plaintiffs in error.

JOHN W. SHARTEL,
J. R. KEATON,
FRANK WELLS,
Attorneys for Plaintiffs in Error.

Filed Oct. 20, 1906.

BENJ. F. HEGLER,
Clerk Supreme Court.

Endorsed on the back as follows: No. 1623. In the Supreme Court of the Territory of Okla. J. G. Bogard, *et al.*, Plaintiffs in error *vs.* F. H. Sweet, *et al.*, Defendants in Error. Petition for allowance of appeal to the Supreme Court of the United States and Assignment of error. Filed Oct. 20, 1906. Benj. F. Hegler, Clerk Supreme Court. Shartel, Keaton & Wells, Oklahoma City, Okla. Attorney for Plaintiffs in Error.

4 In the Supreme Court of the Territory of Oklahoma.

#1623.

J. G. BOGARD ET AL., Plaintiffs in Error,
vs.
F. H. SWEET ET AL., Defendants in Error.

Affidavit Showing Value of Real Property in Controversy.

Comes now J. A. Powers and L. J. Edwards of lawful age, and being first duly sworn depose and say, that they are two of the plaintiffs in error in the above entitled action and that they are well acquainted with the real property in controversy therein, and that the value of same exceeds the sum of Five Thousand Dollars, and is about the sum of Twenty Five Thousand Dollars.

J. A. POWERS.
L. J. EDWARDS.

Subscribed and sworn to before me this 4th day of October, 1906.

PERCY POWERS,
[SEAL.] *Notary Public.*

My commission expires April 1st., 1908.

Endorsed on the back as follows: Filed Oct. 20, 1906. Benj. F. Hegler, Clerk Supreme Court.

5 In the Supreme Court of the Territory of Oklahoma.

No. 1623.

J. G. BOGARD ET AL., Plaintiffs in Error,
vs.
F. H. SWEET ET AL., Defendants in Error.

Order Allowing Appeal.

Now, on this 25th day of October, 1906, it is hereby ordered that the appeal prayed for by plaintiffs in error in the above entitled cause to the Supreme Court of the United States be, and the same is hereby allowed as prayed.

B. F. BURWELL,
Associate Justice of the Supreme Court of the Territory of Oklahoma.

Attest:
BENJ. F. HEGLER, *Clerk.*

[SEAL.]

Endorsed on the back as follows: No. 1623. J. G. Bogard, *et al,* Plaintiffs in error *vs.* F. H. Sweet, *et al.,* Defendants in Error. Order allowing appeal. Filed Oct. 27, 1906, Benj. F. Hegler, Clerk Supreme Court.

6 In the Supreme Court of the Territory of Oklahoma.

No. 1623.

J. G. BOGARD ET AL., Plaintiffs in Error,
vs.
F. H. SWEET ET AL., Defendants in Error.

Bond on Appeal for Cost Without Supersedeas.

Know all men by these presents: That J. G. Bogard, *et al.,* plaintiffs in error in the above entitled cause, as principals, and F. Armbruster and —— as sureties, are hereby held and firmly bound unto F. H. Sweet, J. L. Sweet, Leona S. Herd, Lucy S. Wilson, Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet, Emory Sweet, and A. W. Putnam as guardian of Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet, and Emory Sweet, defendants in error in said cause, in the sum of One Hundred & no/100 Dollars for the payment of which well and truly to be made the said principals and sureties hereby bind themselves, their heirs, executors and assigns.

The conditions of the above obligation are such that whereas, said plaintiffs in error intend to appeal from the judgment and decree

rendered in said cause by the Supreme Court of the Territory of Oklahoma to the Supreme Court of the United States,

Now, therefore, if the said plaintiffs in error, as such appellants, shall prosecute their appeal to effect and answer all costs that may be adjudged against them then, this obligation shall be null and void, otherwise to remain in full force and effect.

J. A. POWERS, *Principals.*

F. ARMBRUSTER, *Sureties.*

7 TERRITORY OF OKLAHOMA, *County of Greer, ss:*

Comes now F. Armbruster, of lawful age, who being first duly sworn, says, that he is one of the sureties on the above and foregoing appeal bond and is worth the sum of Two Hundred Dollars over and above all his debts, liabilities and legal exemptions.

F. ARMBRUSTER.

Subscribed and sworn to before me this 23" day of October, 1906.

PERCY POWERS,
Notary Public.

[SEAL.]

My commission expires April 1st 1908.

This is to certify that I, the undersigned Associate Justice of the Supreme Court of the Territory of Oklahoma, do hereby, on this 25th day of October, 1906 (being the same date on which the citation on appeal in the said above entitled cause is signed) approve the above and foregoing cost bond on said appeal.

B. F. BURWELL,
Associate Justice of the Supreme Court of the Territory of Oklahoma.

Endorsed on the back as follows: No. 1623. J. G. Bogard, *et al.*, Plaintiff in error, *vs.* F. H. Sweet, *et al.*, Defendants in error. Supersedeas Bond. Filed Oct. 27, 1906, Benj. F. Hegler, Clerk Supreme Court.

8 In the Supreme Court of the Territory of Oklahoma.

No. 1623.

J. G. BOGARD, J. H. SIMPSON, H. Y. HOOVER, L. J. EDWARDS, G. S. HULING, S. C. VANLEER, J. A. POWERS, M. C. LOGAN, *pro se* and as the Mother and Next Friend of Addie V. Logan and James W. Logan, Minor Heirs of J. W. Logan, Deceased; BELLE PENDERGRAFT, *pro se*, and as Mother and Next Friend of Claud D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Lillie V. Pendergraft, Isom Pendergraft, and William Pendergraft, Minor Heirs of I. L. Pendergraft, Deceased, Plaintiff in Error,

vs.

F. H. SWEET, J. L. SWEET, LEONA S. HERD, LUCY S. WILSON, ALBERT ORLANDO SWEET, MYRA E. SWEET, JOSEPH L. SWEET, LUCY SWEET, EMORY SWEET, and A. W. PUTNAM, as Guardian of Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet, and Emory Sweet, Defendants in Error.

Petition in Error.

Comes now the said J. G. Bogard, *et al.*, plaintiffs in error and complain of said defendants in error for that, the said defend-
9 ants in error at the August 1903 Term of the District Court of Greer County, Territory of Oklahoma recovered a judgment, by the consideration of said court, against the said plaintiffs in error, in a certain action then pending in said court, wherein the said plaintiffs in error were plaintiffs and the said defendants in error were defendants, the original case-made containing a true and complete copy of all the record and proceedings in said cause is hereto attached, made a part hereof and marked "Exhibit A"; and the said plaintiffs in error aver that there is error in said record and proceedings in this, to wit:

First. Said Court erred in overruling the motion of plaintiffs in error for a new trial.

Second. Said court erred in not rendering judgment for the plaintiffs in error on the pleadings and evidence in said cause.

Third. Said court erred in admitting certain incompetent, irrelevant and immaterial evidence on the part of defendants in error and over the objection of plaintiff in error.

Fourth. Said Court erred in refusing and ruling out certain competent and legal evidence offered on behalf of plaintiffs in error.

Wherefore the plaintiffs in error pray that said judgment so rendered may be reversed, set aside and held for naught, and that a new trial of said cause be directed and the plaintiffs in error restored to all rights which they have lost by reason of the rendition of

said judgment, and for such further relief as to the court may seem just.

J. G. BOGARD ET AL.,
Plaintiffs in Error,
By SHARTEL, KEATON & WELLS AND
J. A. POWERS, *Their Attorneys.*

Filed Oct. 15, 1904.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

10 TERRITORY OF OKLAHOMA, *Greer County, ss:*

In the District Court in and for Said County and Territory.

H. C. SWEET, Plaintiff,
vs.
J. G. BOGARD, H. M. FERGUSON, R. C. HANNAH, S. C. VAN LEER, E. R. FLETCHER, M. E. CLARK, J. H. SIMPSON, S. H. TITTLE, T. B. DUKE, L. J. EDWARDS, H. Y. HOOVER, G. W. LYNCH, G. H. EUBANKS, G. L. ALLEN, J. A. POWERS, E. A. WINKLER, O. P. ELLIOTT, G. S. HULING, BELL PENDERGRAFT, CLAUDE PENDERGRAFT, CONWAY PENDERGRAFT, MYRTLE E. PENDERGRAFT, LILLIE V. PENDERGRAFT, ISAM P. PENDERGRAFT, WILLIAM PENDERGRAFT, W. L. PENDERGRAFT, N. C. LOGAN, ADDIE V. LOGAN, JAMES WELSH LOGAN, J. W. LOGAN, ALICE EDWARDS, MARGIE EDWARDS, ALCIE EDWARDS, Defendants.

Case-made.

Be it remembered that heretofore, to wit on the — day of —— 190– the said plaintiff, H. C. Sweet, commenced his action against said defendants by filing in the District Court of Greer County his petition, which said petition is in words and figures, following to wit:

11 Substitute Copy.

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET, Plaintiff,

vs.

J. G. BOGARD, H. M. FERGUSON, R. C. HANNAH, S. C. VAN LEER, E. R. FLETCHER, M. E. CLARK, J. H. SIMPSON, S. H. TITTLE, T. B. DUKE, L. J. EDWARDS, H. Y. HOOVER, G. W. LYNCH, G. H. EUBANKS, G. L. ALLEN, J. A. POWERS, E. A. WINKLER, O. P. ELLIOTT, G. S. HULING, BELL PENDERGRAFT, CLAUDE PENDERGRAFT, CONWAY PENDERGRAFT, MYRTLE E. PENDERGRAFT, LILLIE V. PENDERGRAFT, ISAM P. PENDERGRAFT, WILLIAM PENDERGRAFT, W. L. PENDERGRAFT, N. C. LOGAN, ADDIE V. LOGAN, JAMES WELSH LOGAN, J. W. LOGAN, ALICE EDWARDS, MARGIE EDWARDS, ALCIE EDWARDS, Defendants.

Petition.

To the Honorable B. F. Burwell, judge of said court:

Comes now the plaintiff in the above entitled cause and, for his cause of action against the defendants therein, alleges that on or about the 10 day of December, 1890, the Mangum Star Printing and Publishing Association was a partnership located and doing business in the town of Mangum, Greer County, Oklahoma, and composed of the following named persons, to wit: J. G. Bogard, H. M. Ferguson, R. C. Hannah, C. S. Van Leer, E. R. Fletcher, M. E. Clark, J. H. Simpson, S. H. Tittle, F. B. Duke, L. J. Edwards, H. Y. Hoover, G. W. Lynch, G. H. Eubanks, G. L. Allen, J. A. Powers, E. A. Winkler, O. P. Elliott, G. S. Huling, I. L. Pendergraft, J. W. Logan, C. J. Edwards and H. C. Sweet.

That since said time the said I. L. Pendergraft has deceased, leaving surviving him his widow, Bell Pendergraft, and his six minor children, Claude D. Pendergraft, Conway Pendergraft,
12 Myrtle E. Pendergraft, Lillie V. Pendergraft, Isam P. Pendergraft and William Pendergraft, and as sole executor and devisee of all his estate, both real and personal, W. L. Pendergraft and also since said time the said J. W. Logan has deceased leaving surviving him his widow, M. C. Logan and two minor children, Addie V. Logan and James Welch Logan, and since that time also the said C. J. Edwards has deceased, leaving surviving him his widow, Alice Edwards, and two minor children, Margie Edwards and Alice Edwards, and this plaintiff therefore, make defendants in this case the following parties, to wit: J. G. Bogard, W. M. Ferguson, R. C. Hannah, S. C. Van Leer, E. R. Fletcher, M. E. Clark, J. H. Simpson, S. H. Tittle, F. B. Duke, L. J. Edwards, H. Y. Hoover, G. W. Lynch, G. H. Eubanks, G. L. Allen, J. A. Powers, E. A. Winkler, O. P. Elliott, G. S. Huling, Bell Pendergraft, Widow of I. L. Pendergraft, deceased, Claude D. Pendergraft, and Conway

Pendergraft, Myrtle E. Pendergraft, Lilly V. Pendergraft, Isam P. Pendergraft, and William Pendergraft, the six minor heirs of the said I. L. Pendergraft, deceased, and W. L. Pendergraft, sole executor and devisee of the said I. L. Pendergraft, deceased, M. C. Logan, widow of J. W. Logan, deceased, Addie V. Logan and James Welch Logan, minor heirs of the said J. W. Logan, deceased, Alice Edwards, widow of C. J. Edwards, deceased, Margie Edwards and Alcie Edwards, minor heirs of the said C. J. Edwards, deceased, partners as the Mangum Star Printing and Publishing Association and the survivors and representatives thereof.

Plaintiff alleges that the said H. C. Sweet, hereinbefore named as one of the members of the said Mangum Star Printing and Publishing Association, is the same person as this plaintiff.

And plaintiff further alleges that the said deceased parties, I. L. Pendergraft, C. J. Edwards, and J. W. Logan, left no other heirs and no other representatives surviving them, than the said parties named herein as their heirs, minor children and representa-
13 tives, and as defendants.

And the plaintiff also alleges that each of the aforesaid minor children of the said I. L. Pendergraft, C. J. Edwards and J. W. Logan, deceased, is under thirteen years of age.

And plaintiff further alleges that on the 13th day of October 1898, he received a patent from the Government of the United States conveying to him the following described tracts of land, situated in Greer County, Oklahoma, towit: The south east quarter of the south east quarter of section twenty seven, the south west quarter of the *of the* south west quarter of section twenty six, the north east quarter of the north east quarter of section thirty four, and the north west quarter of the north west quarter of section thirty five, all in township 5, north, range twenty two west of the Indian Meridian, and that he is now the owner thereof in fee simple, excepting certain parts and parcels of the said land which he has heretofore but subsequent to the said date of the said patent, conveyed to various and sundry persons by his good and sufficient warranty deed.

That on or about the said — day of December, 1890, this plaintiff prepared and at some time not later than about the 10th day of February next thereafter made executed and delivered to the aforesaid members of the aforesaid Mangum Star Printing and Publishing Association his certain deed and instrument in writing, a true copy of which is hereto attached and marked "Exhibit A" and hereby made a part of this petition.

That the land described in said deed, Exhibit A, together with the excepted lots and all excepted portion therein named, is the same land as that described herein above, as contained in the patent of the Government of the United States to this plaintiff, dated October, 13, 1898, but covers some additional land in excess of and not included in said patent.

That Anna Sweet, wife of this plaintiff, never had any
14 interest in said land or in said conveyance except as such wife and merely joined in the execution of said deed because of her said relationship to said plaintiff.

That the said deed of this plaintiff was made by him to the said parties named without any consideration whatever being paid by the said parties to this plaintiff and was made solely for the purpose of inducing, causing and impowering said parties to sell and convey said land in accordance with a certain contract in writing made, executed and delivered by said parties and one E. R. Claunch to this plaintiff at the same time that he made, executed and delivered to them the aforesaid deed and to collect certain notes enumerated and described in said contract in writing, and said parties and the said E. R. Claunch, were required by the said contract to use reasonable diligence to sell said land and collect said notes, and also to pay over to plaintiff and his said wife two-thirds of the gross receipts in cash collected and received on sales of said land and on payments of said note, the intent being to allow the said parties and the said E. R. Claunch, to retain the remaining one third of such receipts in cash as compensation for their services in procuring purchasers of said land in collecting said notes, but the said parties and the said E. R. Claunch had no interest or right in or to said land or in or to said notes other than as agents to sell said land and collect said notes according to the terms of said contract in writing.

That a true copy of said contract in writing is hereto attached marked "Exhibit B" and thereby made a part of this petition.

The said deed and contract were not fully executed and delivered on or about December 10, 1890, when they were prepared but were signed acknowledged and delivered at different times thereafter not later than on or about February 10, 1891, and during said time of the making, executing and delivering said deed and contract in writing some changes were made or intended to have been made in the parties thereto, but through inadvertence and mistake, were not fully made in this to wit: E. R. Claunch signed said contract, but his name was not inserted in said deed, while the names of G. S. Huling, E. A. Winkler, and J. A. Powers were canceled on said contract and O. P. Elliott omitted to sign the same with the intent that the last four names should also be then and there stricken from said deed but through inadvertence and mistake, as plaintiff believe-, were stricken only from the first enumeration of the parties mentioned in said deed.

That the said parties hereinbefore named as members of the Mangum Star Printing and Publishing Association, and the said E. R. Claunch, wholly failed and refused to perform each and every portion of their aforesaid promises and undertakings in regard to said land and said notes and sometime thereafter, in the Spring or summer of 1891, without having sold or having attempted to sell any of said land and without having collected or attempted to collect any money on said notes, returned and surrendered said notes to plaintiff, and as plaintiff believes, said deed; but plaintiff, although he has made diligent search and inquiry for the same has been and is unable to find or to learn of the whereabouts of the same, the said deed, and he believes that the same was been destroyed in his possession. That at the time said notes were returned and surrendered to plaintiff, and as he believes, said deed also, it was understood by and between

all of the parties to said deed and to said contract in writing that said deed and said contract was then and there and should thereafter be of no force or effect, and that the transaction of making and delivering said deed and said contract, as aforesaid, was and should be rescinded and vacated.

That until July 1900, plaintiff did not know that said deed had been recorded.

16 That after the execution of said deed, it was on the 24th day of June, 1891, filed in the office of the County Clerk of Greer County, Texas, which then had jurisdiction over said Territory of Greer County, Oklahoma, and exercised official authority therein and said office of County Clerk was then the proper office in which to file said instrument to give record notice to the world of its existence.

That the grantees in said instrument, however, never carried out any of the uses and purposes of said grant and never did any of the things which it was contemplated when said deed was executed they would do or which they agreed to do in the consideration of the execution of said deed and said grant, and said grant never was accepted and the benefits thereof taken or the obligations performed on the part of the said grantees and the uses and purposes of said deed and grant have long since wholly ceased in operation and effect.

Second Cause of Action.

And for a further and second cause of action this plaintiff further alleges that at the time said deed was executed, one A. S. Mangum had a patent from the State of Texas to said land, and the plaintiff held a deed from his heirs to a certain interest therein and as between the parties to said last named deed was to be the owner of said land described in "Exhibit A" and said land was claimed, with all of Greer County, as a part of the State of Texas and as constituting Greer County in the State of Texas; that subsequently, however, and by a decision of the Supreme Court of the United States on March 16, 1896, under the authority of the laws of the United States as contained in section 25 of the Organic Act of the Territory of Oklahoma, decided that said Greer County, Texas, and Oklahoma, never did belong to the State of Texas, and was and has been at all times herein stated, a part of the domain and Territory of the United States of America, and therefore, on the 18 day of January, 1897, the

17 Congress of the United States enacted a law, duly approved by the President, whereby grants and titles of said lands in Greer County, Oklahoma, including the land in controversy could be obtained and procured only under the homestead law of the United States, as modified by said Act of Congress of January 18, 1897, pertaining to the acquisition of title to land in Greer County, Oklahoma, and was under the "Additional land" clause of said latter Act of Congress of — United States that the plaintiff has acquired his title to said land and by reason of the premises, the plaintiff alleges that said deed. "Exhibit A" to said various grantees was without consideration, and has never been accepted or used in accordance with the intention and agreements of the parties and has never been given any effect

whatever, and furthermore, that under the laws of this land, said land and estate being at the time of said deed a part of the domain of the United States, this plaintiff could grant to said grantee, and they could acquire, no right whatever under the said grant, and the same cannot operate to divest the plaintiff of his subsequently acquired title.

That said deed "Exhibit A" under the law, having been made prior to the time that plaintiff was entitled to any patent from the Government of the United States to said land, the same cannot operate to divest plaintiff of his right to acquire title to the land in controversy through and from the Government of the United States.

And plaintiff further alleges that the said patent to said land from the State of Texas, to the said A. S. Mangum, prior to the making of said deed, "Exhibit A" by this plaintiff was and always has been wholly void and of no effect whatever, and similar patents executed by the State of Texas have been by the highest courts of said state *been* held void and inoperative to convey said lands from the state of Texas, and the heirs of said A. S. Mangum surrendered and permitted said patent to be cancelled by the state of Texas.

The plaintiff further alleges that said deed "Exhibit A"
18 being on record now in the office of the Register of Deeds of Greer County, Oklahoma Territory, operates to cloud the title of this plaintiff to said quarter section of land, and to the sundry and various parts thereof, which plaintiff yet owns and controls and possesses in fee simple, and also operates to cloud the title of the remaining portions of said quarter section of land which this plaintiff has conveyed by warranty deed to various and sundry persons, who on account of said cloud and on account of the covenants in plaintiff's said deeds to them, may each bring separate sections against plaintiff to quiet their title to the separate and several portions of said land owned by them, and thereby this plaintiff be involved in a multiplicity of suits which will entail upon him expensive and noxious litigation and great cost.

The plaintiff has no other adequate and complete remedy at law to obtain relief hereby sought.

Wherefore plaintiff prays judgment of the court that said defendants and each and all of them be required to appear and answer in this cause and to set up their interest; if any they have in this action and the property therein involved, and that judgment be rendered for the plaintiff, granting to him the relief he is entitled to under the facts herein set forth and that the said deed, "Exhibit A" be vacated and cancelled and held for naught and the cloud thereby made upon the title to the tracts of land herein set forth be removed, and plaintiff be held to be vested with the clear title to said tracts of land on October 13, 1898, by his patent from the United States to said land, free and clear of all charges or claims of any kinds or nature whatever by virtue of said deed "Exhibit A" herein set out, and that the plaintiff have and recover all further legal and equitable relief to which he may show himself entitled and all costs of this action.

GARRETT & THACKER,
DALE & BIERER,
Attorneys for Plaintiff.

19 TERRITORY OF OKLAHOMA, *County of Greer:*

Before me the undersigned authority on this 2nd day of August 1900 personally appeared Chas. M. Thacker, who being by me first duly sworn says on his oath that he is one of the above named attorneys for plaintiff in the above action; that he has read the above and foregoing petition of the plaintiff, H. C. Sweet, and knows the contents thereof and that he believes the matters and things therein stated are true. That the said H. C. Sweet is absent from the Territory of Oklahoma and, therefore, affiant makes this affidavit in behalf of the said H. C. Sweet.

CHAS. M. THACKER.

Subscribed and sworn to before me this the 2nd day of August, 1902.

B. D. SHEAR, *Clerk.*

[SEAL.] By O. P. ELLIOTT, *Dep.*

20 "EXHIBIT A."

THE STATE OF TEXAS, *County of Greer:*

Know all men by these presents that we, H. C. Sweet, Anna Sweet, wife of said H. C. Sweet, of the County of Greer and the State aforesaid, for and in consideration of the sum of Ten dollars to us paid in hand by the Mangum Star Printing and Publishing Association composed of the following persons, J. G. Bogard, H. M. Ferguson, R. C. Hannah, S. C. Van Leer, E. R. Fletcher, I. L. Pendergraft, M. E. Clark, J. H. Simpson, S. H. Tittle, F. B. Duke & Co., L. J. Edwards, J. W. Logan, H. Y. Hoover, G. W. Lynch, G. H. Eubank, H. C. Sweet, *nad* G. L. Allen, have granted sold and conveyed and by these presents do grant, sell and convey unto the said J. A. Powers, J. G. Bogard, H. M. Ferguson, R. C. Hannah, S. C. Van Leer, E. A. Winkler, O. P. Elliott, E. R. Fletcher, I. L. Pendergraft, M. E. Clark, J. H. Simpson, G. S. Huling, S. H. Tittle, F. B. Duke & Co., L. J. Edwards, J. W. Logan, H. Y. Hoover, G. W. Lynch, G. H. Eubank, H. C. Sweet and G. L. Allen, of the County of Greer and State of Texas, all that certain tract or parcel of land situated in Greer County, Texas, described as follows, to wit: All of the town lots in the city of Mangum, Greer Co, Texas, as appears upon corrected plat of said town filed and recorded in the county clerk's office of Greer County, Texas, in deed recorded of said county in volume 2 page 35 and being the north half of 320 acres of land patented to A. S. Mangum Dec. 10th, 1885, said patent recorded in Co. Clerk's office in said county in deed record Vol. 2, page 14, to which record reference is here made for more complete description of this land. The following lots as shown by said mentioned plat are not sold, viz.:

Lots No. 5, 8 and 3 in block 2.

Lots No. 3 and 1 in block 25.

21 Lots. No. 1, 2, 3, 5, 6 and 4 in block 13.

Lots No. 1, 2, 3, 4, 5, and 6 in block No. 11.

Lots 6, 5, 4, 3, and 2 in block 19.

Lots No. 5, 7, in block No. 3.
Lots No. 2, 6, 3, 4, 5, in block No. 15.
Lots No. 1, 2, 3, 4, 5, & 6 in block No. 10.
Lots No. 1, 2, 3, 4, 5, and 6 in block No. 9.
Lots No. 1, 2, 3, 4, 5, and 6 in block No. 12.
Lots No. 1, 2, and 5 in block No. 8.
Lots No. 6, 1, 5 and 4 in block 16.
Lots No. 6, 3, 2, 5 and 4 in block 18.
Lot No. 1, in block No. 39.
Lot No. 2, in block No. 20.
Lots No. 2 and 3 in block No. 33.
Lots No. 1 and 2 in block No. 24.
Lots No. 1 in Block No. 14.
Lot No. 1 in block No. 26.
Lots No. 1, 2, 3, and 4 in block No. 28.
Lots 3 and 4 in block No. 6.
Lot No. 1 in block No. 32.
Lot No. 1 in block No. 29.
Lot No. 1 and 2 in block No. 17.
Lots No. 2, 3, and 4 in block No. 26.
Lots No 1 " " " 15 and all of block No. 1.

Lots 2, 3, and 4 in block No. 26 and lot No. 1 in block 15 are absolutely reserved to ourselves. The remainder of said excepted lots above mentioned have heretofore been sold by us and on a part of said lots we now hold vendor's lien notes for the purchase of said lots which notes and vendor's lien retained thereon and sold and conveyed to the grantees herein and said grantees are sub-
22 rogated to all rights, title and interest held by us in and to said lots and notes. To have and to hold the above described premises together with all and singular the rights and appurtenances thereto in any wise belonging unto the said J. A. Powers, J. G. Bogard, H. M. Ferguson, R. C. Hannah, S. C. Van Leer, E. A. Winkler, O. P. Elliott, E. R. Fletcher, I. L. Pendergraft, M. E. Clark, J. H. Simpson, G. S. Huling, S. H. Tittle, F. B. Duke & Co., L. J. Edwards, J. W. Logan, H. Y Hoover, G. W. Lynch, G. H. Eubanks, H. C. Sweet, and G. L. Allen, and their heirs and assigns forever.

And we do hereby ourselves and our heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said J. G. Bogard, H. M. Ferguson, R. C. Hannah, S. C. Van Leer, E. R. Fletcher, I. L. Pendergraft, M. E. Clark, J.H. Simpson, S. H. Tittle, G. W. Lynch, G. H. Eubank, H. C. Sweet and G. L. Allen, heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Witness our hands at Mangum, Texas, this — day of —— A. D. 18—.

H. C. SWEET.
ANNA SWEET.

THE STATE OF TEXAS, *Greer County:*

Before me J. W. Logan, County Clerk in and for Greer County, Texas, on this day personally appeared H. C. Sweet and Anna

Sweet wife of H. C. Sweet, both known to me to be the persons whose name is subscribed to the foregoing instrument and acknowledge to me that they executed the *the* same for the purposes and consideration therein expressed. And the said Anna Sweet wife of said H. C. Sweet, having been examined by me privately and apart from her husband and having the same fully explained to her she the
23 said Anna Sweet acknowledged such instrument to be her act and deed and she declared she has willingly signed the same for the purposes and consideration therein expressed and that she did not wish to retract it.

Given under my hand and seal of office this 10th day of Feb. 1891.

J. W. LOGAN,
County Clerk, Greer County, Texas.

Filed June 24, 1891 at 4 o'clock P. M. and recorded same day and hour.

J. W. LOGAN,
County Clerk, Greer County, Texas.
By LOGAN TEAGARDEN, *Deputy.*

24 EXHIBIT B.

STATE OF TEXAS, *Greer County:*

Know all men by these presents that whereas on the 10th day of Dec. 1890, H. C. Sweet and his wife, Anna Sweet, did execute and deliver their warranty deed to us for the town lots in said deed described situated in the town of Mangum, Greer County, Texas, and accurately described in said deed which deed is recorded in Vol. 2 p. 308-9 Deed Record of Greer County, Texas, and to which reference is hereby made for a more complete description of said town lots now theretofore in consideration of said conveyance of said town lots by said H. C. Sweet and wife, Anna Sweet and other valuable considerations to us paid, we hereby bind ourselves the grantees in said deed our heirs and assigns and legal representatives to use reasonable diligence to sell said lots and to collect payments therefor and to pay over to H. C. Sweet and wife Anna Sweet two thirds (2-3) of the gross receipts in cash received and collected on all sales of said lots as soon as collected and whereas the said H. C. Sweet has transferred to us the following described notes to wit:

Harwood & Mathis to H. C. Sweet due Aug. 13th 1888, dated Mangum Texas, Aug. 13, 1887, amount $28.00 W. H. Cannon to H. C. Sweet, dated Mangum Tex. July 26, 1887, due July 28, 1888, Jas. S. Ellison to H. C. Sweet, Amt. $40, dated Mangum, Texas, July 23rd, 1887, due July 23rd, 1888, Henry Hoover, to H. C. Sweet, Amt. $30.00 date October 31st, 1887, due Oct. 31st, 1888, N. B. Claunch to H. C. Sweet, Amt. $40.00 date Mangum, Texas, Oct. 10, 1887 due Oct. 10, 1888, A. H. Ellison to H. C. Sweet, Amt. $50.00 date Mangum, Texas, July 23rd 1887, due July 23rd 1888, Miss. M. E. Cosper, to H. C. Sweet, Amt. $20.00 date Mangum, Texas,

Aug. 2nd, 1887, due Aug. 2nd, 1888, James Clark to H. C.
25 Sweet, Amt. $125.00 date Mangum, Tex. Sept. 26, 1887, due Sept. 26th, 1888, Jarrett Todd to H. C. Sweet, Amt. $25.00 date Mangum Texas, May 21st, 1887 due May 21st, 1888, W. Ed. Clampitt to H. C. Sweet Amt. $30.00 date Mangum Texas, Oct. 20, 1887, due Oct. 20th, 1888, E. R. Claunch to H. C. Sweet Amt. $25.00 date Oct. 20th, 1887, due Oct. 20th 1888, Tony Keller to H. C. Sweet Amt. $40.00 date Sept. 23rd 1887, due Sept. 23rd, 1888, F. C. Thompson to H. C. Sweet Amt. $56. date Mangum Texas, Aug. 15th, 1887, due Aug. 15th, 1888, A. P. Miller to H. C. Sweet Amt. $20.00 dated Mangum, Texas, July 21st 1888, W. Ed. Clampitt to H. C. Sweet Amt. $20.00 dated Mangum, Tex. July 2nd, 1887, due July 20th, 1888, S. H. Tittle to H. C. Sweet Amt. $40.00 date Aug. 17th, 1887, due Aug. 27th, 1888, W. S. Pierson to H. C. Sweet Amt. $40.00 dated Aug. 6th, 1887, due Aug. 6th, 1888 W. T. Williamson to H. C. Sweet Amt. $40.00 date July 1887 due July 25th 1888, Emma Jones and I. J. Rude to H. C. Sweet, Amt. $40.00 date Mangum Texas, Jan. 1st, 1887, due Jan. 1st, 1888, Mrs. M. E. Cosper to H. C. Sweet Amt. $20.00 date Mangum, Texas, July 29th, 1887, due July 29th 1888, which said notes are secured by vendor's lien on a portion of said reserved lots and said deed.

Now therefore we agree and bind ourselves to use reasonable diligence to secure the payment of said notes and to pay the said H. C. Sweet two thirds of the gross receipts connected on said notes.

Witness our hands this the 10th day of December, 1890. U. G. Bogard, J. W. Logan, Mrs. E. R. Fletcher, S. H. Tittle, S. C. Van Leer, H. M. Ferguson, F. B. Duke & Co. G. W. Lynch, H. Y. Hoover, R. C. Hannah, M. E. Clark, George L. Allen, L. J. Edwards, G. H. Eubank, E. R. Claunch, I. L. Pendergraft, and J. H. Simpson.

26 THE STATE OF TEXAS, *County of Greer:*

Before me, A. J. Berryman, a Notary Public in and for Greer County, Texas, on this day personally appeared J. W. Logan, Mrs. E. R. Fletcher, S. H. Tittle, G. H. Eubank, S. C. Van Leer, H. M. Ferguson, F. B. Duke & Co. G. W. Lynch, H. Y. Hoover, R. C. Hannah, M. E. Clark, L. J. Edwards, E. A. Winkler J. H. Bogard, to me known to be the persons whose names are subscribed to the foregoing instrument and acknowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this the 13th day of December, A. D. 1890.

(Signed) A. J. BERRYMAN,
A Notary Public in and for Greer County, Texas.
[NOTARY SEAL.]

27 STATE OF TEXAS, *County of Greer:*

Before me J. W. Logan, Clerk of the County Court in and for said County and state on this day personally appeared I. L. Pendergraft, J. H. Simpson and E. R. Claunch, known to me to be the persons whose names are subscribed to the foregoing instrument, and ac-

knowledged to me that they executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 4 day of Feb'y, 1891.

J. W. LOGAN,

[SEAL.] *County Clerk, Greer County, Texas.*

And thereafter and on the 18th day of August, 1900, the Disclaimers of H. M. Ferguson, O. P. Elliott, F. B. Duke and G. H. Eubank were filed, which said Disclaimers are in words and figures following, to wit:

28 Copy.

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now H. M. Ferguson, one of the defendants in the above styled and numbered cause, and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) H. M. FERGUSON, *Defendant.*

Filed Aug. 18, 1900.

Copy.

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now O. P. Elliott one of the defendants in the above styled and numbered cause and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) O. P. ELLIOTT, *Defendant.*

Filed Aug. 18, 1900.

29 Copy.

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now E. B. Duke, one of the defendants in the above styled and numbered cause and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate, and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) F. B. DUKE, *Defendant.*

(Filed Aug. 18, 1900.)

Copy.

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now G. H. Eubank, one of the defendants in the above styled and numbered cause, and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) G. H. EUBANK, *Defendant.*

(Filed Aug. 18, 1900.)

30 And thereafter and on the 21st day of August, 1900, the Disclaimer of R. C. Hannah was filed, which said Disclaimer is in words and figures following to wit:

(Copy.)

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now R. C. Hannah, one of the defendants in the above styled and numbered cause, and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate,

and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) R. C. HANNAH, *Defendant.*

(Filed Aug. 18, 1900.)

And thereafter and on the 24th day of August, 1900, the Disclaimer of George L. Allen was filed, which said Disclaimer is in words and figures following, to wit:

31 Copy.

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now George L. Allen one of the defendants in the above styled and numbered cause and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) GEORGE L. ALLEN, *Defendant.*

And thereafter and on the 25th day of August, 1900, the Disclaimer of G. W. Lynch was filed, which said Disclaimer is in words and figures following, to wit:

32 Copy.

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now G. W. Lynch, one of the defendants in the above styled and numbered cause, and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) G. W. LYNCH, *Defendant.*

And thereafter and on the 1st day of September, 1900 the Disclaimer of S. H. Tittle was filed, which said Disclaimer is in words and figures following, to wit:

33 (Copy.)

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now S. H. Tittle, one of the defendants in the above styled and numbered cause, and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) H. S. TITTLE, *Defendant.*

(Filed Aug. 18, 1900.)

And thereafter and on the 11th day of September 1900, the court made an order passing said cause.

34 And thereafter and on September 12th, 1900, the court granted leave to withdraw said demurrer and to file a motion in lieu thereof.

And thereafter and on September 13th, 1900, leave was granted the plaintiff to amend his petition by interlineation.

And thereafter and on the 14th day of September, 1900, the Disclaimer of W. L. Pendergraft was filed, which said Disclaimer is in words and figures following to wit:

35 (Copy.)

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now W. L. Pendergraft, one of the defendants in the above styled and numbered cause, and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, land, real estate and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) W. L. PENDERGRAFT,
Sole Devisee and Legatee of I. L. Pendergraft.

(Filed Aug. 18, 1900.)

And thereafter and on the 14th day of September, 1900, the Disclaimer of M. E. Clark was filed, which said Disclaimer is in words and figures following to wit:

36 (Copy.)

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

Comes now M. E. Clark, one of the defendants in the above styled and numbered cause, and hereby disclaims any right, title or interest whatever in or to any of the lots, blocks, lands, real estate and premises mentioned and described in plaintiff's petition filed in this cause, and agrees that the deed mentioned in plaintiff's petition may be cancelled.

(Signed) M. E. CLARK, *Defendant.*

(Filed Aug. 18, 1900.)

And thereafter and on September 14th, 1900 leave was granted to refile demurrer, which said amended demurrer is in words and figures following, to wit:

37 TERRITORY OF OKLAHOMA, *Greer County, ss:*

In the District Court in and for said County and Territory.

H. C. SWEET ET UX., Plaintiff,
vs.
J. G. BOGARD ET AL., Defendants.

Demurrer.

Come now the defendants, J. G. Bogard, J. H. Simpson, H. Y. Hoover, L. J. Edwards, G. S. Huling, S. C. Van Leer, J. A. Powers, M. C. Logan *pro se* and as the mother and next friend of Addie V. Logan and James W. Logan, minor heirs of J. W. Logan, deceased and Belle Pendergraft, *pro se* and as the mother and next friend of Claud D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Lillie E. Pendergraft, Isom P. Pendergraft and William Pendergraft, minor heirs of I. L. Pendergraft deceased, and demur to the petition of plaintiffs upon the ground that said petition and each count thereof wholly fails to state facts sufficient to constitute a cause of action against these defendants.

(Signed) J. R. KEATON,
Attorney for said above named Defendants.

38 Thereafter and on May 10th, 1901, was filed a suggestion of the death of H. C. Sweet, together with a motion that the action be revived in the names of J. L. Sweet, Leona S. Herd, Lucy S. Wilson and F. H. Sweet, and A. W. Putnam Guardian of the

estate of Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet, and Emory Sweet, minors, and that the suit be revived in those as plaintiffs, which said suggestion and motion are in the words and figures as follows, to wit:

(Copy.)

In the District Court of Greer County, Oklahoma Territory.

H. C. SWEET
vs.
J. G. BOGARD ET AL.

To the Honorable B. F. Burwell, District Judge:

Comes now J. L. Sweet, Leona S. Herd, Lucy S. Wilson and F. H. Sweet, and the following minors by their guardian, A. W. Putnam, namely Albert Orlando Sweet, Myra E. Eweet, Joseph L. Sweet, Lucy Sweet, and Emory Sweet, and respectfully show to the Court that since the filing of this suit, H. C. Sweet, the plaintiff has departed this life and left the aforesaid parties as his sole heirs.

Wherefore they ask that this suit be revived in their name as plaintiffs, and that they be allowed to prosecute the same as such plaintiffs and heirs of H. C. Sweet, deceased.

C. M. THACKER,
Attorney for J. L. Sweet, Leona S. Herd, Lucy S. Wilson, F. H. Sweet, and A. W. Putnam, Guardian of the Estate of Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet, and Emory Sweet, Minors.

Filed May 10, 1901.

39 And thereafter and on the 10th day of May 1901, an order reviving the action in the names of J. L. Sweet, *et al.* and passing on the demurrer to petition was filed, which said order is in words and figures following to wit:

H. C. SWEET
vs.
J. G. BOGARD ET AL.

On application ordered that this cause be and it is hereby revived in the name of the legal representatives. And now the Demurrer of defendant to the petition herein coming before the Court, and argument thereof is made for defendant by B. B. Blakeney and J. R. Keaton; and for the plaintiff by Charles M. Thacker, the court being advised, it is ordered that said demurrer be, and it is hereby overruled as to the first count, and sustained as to the second count of said petition, and both parties except thereto.

And thereafter and on the 10th day of May, 1901, the court made an order granting leave to the defendant to answer within ten (10) days.

And thereafter and on the 3rd day of June, 1901, by leave of court the answer of defendants was filed, which said answer is in words and figures following to wit:

40 TERRITORY OF OKLAHOMA, *County of Greer, ss:*

In the District Court.

F. H. SWEET ET AL., Heirs of H. C. Sweet, and ANNA SWEET, Deceased, Plaintiffs,
vs.
J. G. BOGARD ET AL., Defendants.

Answer.

Comes now defendants J. G. Bogard, J. H. Simpson, H. Y. Hoover, L. J. Edwards, G. S. Huling, S. C. Van Leer, J. A. Powers, M. C. Logan, *pro se* and as the mother and next friend of Addie V. Logan and James W. Logan, minor heirs of J. W. Logan, deceased, Belle Pendergraft, *pro se* and as the mother and next friend of Claud D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Lillie V. Pendergraft, Isom P. Pendergraft, and William Pendergraft, minor heirs of I. L. Pendergraft, deceased, and for answer to first count of plaintiff's petition allege the following:

1. That they admit the execution of the warranty deed by H. C. Sweet and Annie Sweet, his wife, set out in plaintiff's petition as "Exhibit A" and the execution of the written contract therein set out as "Exhibit B" and that said H. C. Sweet received a patent for the tract of tracts of land described in said petition on October 13, 1898, as therein alleged.

2. That they deny each and every other material allegation contained in said first count of the petition of plaintiffs, and specifically deny that said deed from the said H. C. and Annie Sweet so made and executed to them and other defendants named in said petition was without consideration, but, on the contrary, state that same was executed for a good, sufficient and valuable consideration.

41 Wherefore these defendants pray judgment against plaintiffs quieting and confirming their title to the land described in said petition, for costs and all other just and equitable relief.

SHARTEL, KEATON & WELLS,
Attorneys for said Defendants.

And thereafter and on September 10th, 1902, application was filed to restore lost records, which said application is in words and figures following to wit:

42 In the District Court of Greer County, Oklahoma Territory.

HEIRS OF H. C. SWEET
vs.
J. G. BOGARD ET AL.

Application to Restore Lost Records.

To the Honorable Frank E. Gillett, District Judge:

Comes now the plaintiffs and represent to the Court that heretofore on the 8 day of December, 1901, the original petition and answer and demurrers and all the original papers filed in this cause were destroyed by fire. That prior to said destruction by fire, all of the parties defendant, had been duly served with summons in this cause, and had entered their appearance in this cause. Plaintiffs further show that certified copies of said original papers cannot be had. That a substantial copy of the petition and of the answer of the defendants who filed answer and substantial copies of the disclaimers filed by the defendants who filed disclaimers herein, and a substantial copy of the application to revive this suit in the name of the heirs of H. C. Sweet, as plaintiffs, are herewith filed. Plaintiffs say that such loss and destruction of the papers and record in this cause by fire as aforesaid, was without fault or negligence of these plaintiffs, and that the loss or destruction of such record, unless supplied will or may result in damage to these plaintiffs.

Wherefore plaintiffs pray that this application be entered of record, and that the same shall be heard by the Court upon such notice and in the manner prescribed by law, and that upon a hearing hereof the petition, answer, demurrer, disclaimers and application to revive herewith filed, be sustituted in lieu of such original papers in this cause so destroyed by fire as aforesaid for costs and general relief.

C. M. THACKER,
GARRETT & GARRETT,
Attorneys for Plaintiffs.

43 TERRITORY OF OKLAHOMA, *Greer County:*

Before me the undersigned authority on this day appeared personally F. H. Sweet, one of the plaintiffs in the above entitled cause, who being on oath duly sworn deposes and says that the allegations of the foregoing petition are true, and that the copies of the lost papers herewith filed are substantially correct, to the best of his information and belief.

F. H. SWEET.

Sworn to and subscribed before me this 16th day of September, 1902.

N. E. SISSON, *Clerk.*

And thereafter and on September 10th, 1902, leave was given to supply lost papers, which said order is in words and figures following to wit:

And thereafter and on September 12th, 1902, and order was made granting leave to substitute papers by September 15th, 1902.

44 And thereafter and on the 17th day of August, 1903, the same being one of the judicial days of the August 1903 term of said court, said cause came on for hearing and the following proceedings were had and evidence introduced, which said evidence is in words and figures following, to wit:

In the District Court in and for Greer County, Territory of Oklahoma, August Term, 1903.

Before Hon. James K. Beauchamp, Judge.

No. 276.

F. H. SWEET ET AL., Plaintiffs,
vs.
J. G. BOGARD ET AL., Defendants.

Appearances.—Messrs. Garrett & Garrett, for Plaintiffs; Messrs. Keaton & Powers, for Defendants.

Now on the 17th day of August, 1903, this case came on for trial and after the opening statements for the respective parties, the plaintiffs offered in evidence the following testimony:

Thereupon O. P. ELLIOTT, a witness of lawful age, being
45 duly sworn, on behalf of the plaintiffs testified as follows:

Questions propounded by S. B. GARRETT:

Q. State your name and residence and where have you resided since 1890?

Mr. KEATON: We object to the introduction of any testimony under the petition for the reason that it fails to state any cause of action against these defendants.

The COURT: Overruled and exception noted.

A. O. P. Elliott, Greer County, since 1890, part of the time at Mangum.

Q. State whether you were acquainted with H. C. Sweet in his lifetime?

A. Yes sir.

Q. And Anna Sweet?

A. Yes sir.

Q. State whether they are dead or not?

A. Yes sir.

Q. I will ask you to examine the deed, marked Exhibit A attached to the plaintiff's petition and state whether or not you know anything about the execution and delivery of that instrument and whether you are one of the parties to that deed as grantees?

A. I could not say for certain whether my name was included in it or not. I don't remember ever seeing the original of it. I could not say.

Q. This copy includes the name of O. P. Elliott. Is that your name?

A. Yes sir.

Q. Where did you live at the time this deed was executed?

A. What is the date of it?

Q. It is dated December, 1890.

A. I was living in Mangum.

Q. State what was the consideration if anything paid for the execution and delivery of that deed?

46 Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and to the competency of the witness.

The COURT: He has not shown that he knows anything about the consideration. Objection sustained for the present.

Q. Do you know anything about a contract that was made between H. C. Sweet and J. G. Bogard, H. M. Ferguson, yourself and others?

A. I don't remember. I have no knowledge of it. It will state all I know was that I took stock in that Company, in the Mangum Star Printing Company. I don't remember ever seeing the contract.

Q. What was that Mangum Star Printing Co. gotten up for?

A. As I understand it, it was gotten up to aid H. C. Sweet in selling Mangum town lots. That was my understanding.

Q. Did the company ever sell any Mangum town lots for H. C. Sweet?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and to the competency of the witness and not being the best evidence.

The COURT: Overruled. Exception noted.

A. None to my knowledge.

Q. State if you know whether any other consideration was paid for the execution of the deed by H. C. Sweet than the contract for the sale of town lots and collection of the notes mentioned in the contract?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and to the competency of the witness and the deed itself being the best and only evidence admissible under the issues in this case, as to the consideration.

The COURT: I think I shall have to sustain the objection. He may state the fact.

A. There was no other consideration to my knowledge.

Q. State what the consideration was paid for the execution of the deed?

Mr. KEATON: Objected to as incompetent, irrelevant and
47 immaterial, to the competency of the witness to testify on that point and for the further reason that the deed itself is under the issues in this case the only competent evidence as to the consideration.

The COURT: Objection sustained.

Q. Just state in your own way what you know, if anything about whether this contract was carried out or whether it was abandoned?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial, to the competency of the witness.

The COURT: Let him state the facts. Exception noted.

A. There was nothing done to my knowledge. I did not do anything myself. Not carried out to my knowledge.

Q. Were any of the lots sold by the grantees mentioned in this deed?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not the best evidence under the issues in this case.

The COURT: Objection overruled. Exception noted.

A. None sold to my knowledge.

Q. State what was done with the notes that were turned over under the contract to the company?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and to the competency of the witness.

The COURT: Overruled. Exception noted.

A. Nothing to my knowledge.

Q. Was there ever anything collected by the said Company on the notes? Do you know whether there was?

A. No, I do not.

Q. Who had the collection of the notes, had charge of that part of the business.

A. I don't know for sure unless R. C. Hannah. I don't know myself.

Cross-examination.

By Mr. KEATON:

48 Q. Did you ever see those notes at any time?

A. No stir.

Q. Ever see the deed?

A. Not that I remember of. I took stock——

Q. Is it not a fact that the inducement for you to take stock in this Company was the giving of this deed by Mr. Sweet to the Company and in order to start that paper and hold the county seat here?

A. The inducement, as I understood, was to help the town and help Mr. Sweet sell these town lots.

Q. How much money did you pay for that stock you took in the paper?

A. I think it was $5 a share.

Q. Did you pay $5.

A. If I remember the circumstances, I did not pay the money myself.

Q. Do you know as a matter of fact that by reason of the inducement to the members of the Star Printing Company to start that paper, establish it here and make the fight for the town, there was $750 paid in by the different members or about that in cash and notes?

A. I understood there was about that amount. I do not know.

Q. Really you do not know anything personally about it?

A. No sir, I do not. I took the stock in the paper——

Q. Did you pay for the stock?

A. It was transferred to me. Some body else paid for it.

Q. That is all you know about it.

A. Yes sir.

Q. You do know, Mr. Elliott, that Mr. Sweet went to all of you parties to get you to organize the Company and offered to make this deed for you as part consideration?

A. I do not know whether he went to all.

Q. Do you know he made a public talk or speech?

A. I understood so. I was out of town at that time.

Q. Did he talk to you about it?

49 A. I don't remember that he did. Mr. Powers spoke to me about it.

Q. Powers is one of the parties here?

A. Yes sir.

Q. And you are one of the parties?

A. Yes.

Redirect examination.

By A. R. GARRETT:

Q. You waived all rights you had under this?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and to the competency of the witness.

The COURT: Overruled and exception.

A. I never claimed I had any rights.

Q. What became of that Star Publishing Company?

Mr. KEATON: Objected to as incompetent and irrelevant and immaterial.

The COURT: Overruled and exception noted.

A. It was abandoned and dropped. Did not hear of it after that.

Recross-examination.

By Mr. KEATON:

Q. How long did it run?
A. I could not say.

The witness was then excused and the plaintiffs offered in evidence the deposition of G. H. Eubank, which is in words and figures as follows to wit:

My name is G. H. Eubank, I reside in the City of Ennis, Ellis County, Texas, and have resided there since March, 1895. In May 1890, I moved to Mangum, Greer County, (then Texas) now Oklahoma Territory. I resided there continuously from that date until about the 1st of March, 1895, when I moved to Ennis, Texas.

While living at Mangum I was engaged in the practice of law and am now so engaged. The matter involved in this suit, come
50 up in this way, about December 1890, the Mangum Star, a newspaper published at Mangum was sold by the publisher, Dawson, to the parties named in a contract dated Dec. 10th, 1890, executed by H. C. Sweet, and Wife, Annie Sweet, a copy of which is hereto attached marked Exhibit "A" for identification. The parties named in that contract intended to continue the publication of said paper. I was one of the parties mentioned in the contract, and took an active part in continuing the publication of the paper. A proposition was made by H. C. Sweet to the parties therein mentioned in substance as follows: That is the parties who owned the paper would incorporate under the laws of the State of Texas, a company the object of which Company was to publish said newspaper, and also to sell town lots and trade in real property; that the said Sweet would transfer a one third interest in the lots described in said contract, and also turn over to said parties certain vendor's lien notes, which said Sweet held on various lots in the town of Mangum for the purpose of collection. The parties were to collect said notes for a certain per cent. and were also to advertise the said Town and sell the town lots and turn over to the said Sweet two thirds of the proceeds.

In compliance with our agreement with Sweet, I acting with others who owned the said paper, applied to the Secretary of the State of Texas, for a charter to carry on the business as above agreed upon. The Secretary of State, replied that there was no provision in the statute of the State of Texas, by which a company that traded in real estate could be organized. And in consequence nothing more was done in so far as incorporating was concerned.

The notes that we had to collect were at one time placed in my hands, to ascertain if the same were collectable. Upon an investigation of the matter myself acting with and in conjunction with all the other parties to said contract, came to the conclusion that the expense of collecting said notes would amount to more than
51 we would realize out of them. The notes were kept for a while and finally turned back to Sweet. Nothing was ever

collected on any of said notes by myself or the other parties named in said contract.

Now with reference to the sale of the lots, the parties who owned the paper run an advertisement in the paper, advertising the town of Mangum for a short while. This soon played out. Nothing was ever done with reference to the sale of the lots, except running said advertisement.

The only consideration for the conveyance recited in said contract, was as follows:—(1) That we would incorporate and secure a Charter: (2) That we would advertise and sell the lots described in said deed, and after said sales were made deliver to Sweet the Grantor, two thirds of the proceeds of said sales of said lots. The grantees did not pay Mr. Sweet any money or other consideration for said property except as above stated. No charter was obtained; no lands were sold and the notes were finally turned back to Sweet. None of the vendees ever paid or gave any sort of consideration except as above indicated.

After Company failed to procure a charter, no further interest was taken in the matter to sell the town lots or to collect the notes; and the parties who held shares in the paper traded the same or sold and nothing more was ever done towards carrying out the original contract. I was acting as a Director of said Company from the time it was first organized up to Sept. 1st, 1891 and at that time I took charge of the paper as business manager of it and continued until about Feb. 1895. We were only to act as the agent for H. C. Sweet in selling said lots and the deed was made to us as a matter of convenience, and with the view that we would transfer same to the corporation when same was duly organized which was never done.

Mr. KEATON: All that part of it stating those considerations outside of the contract and deed we object to.

Overruled. Exception.

52 Thereupon R. C. HANNAH, a witness of lawful age, testified on behalf of the plaintiffs as follows, on direct examination by Mr. S. B. Garrett:

Q. State where you reside Mr. Hannah?

A. Mangum, Greer County.

Q. State where you resided in December, 1890?

A. Same place.

Q. State whether you became acquainted with H. C. Sweet in his lifetime?

A. Yes sir.

Q. State whether you knew H. M. Ferguson and the other defendants in this suit?

A. I guess I knew them if they were members of the organization.

Q. S. C. Van Leer, E. R. Fletcher, M. E. Clark, J. H. Simpson, S. H. Tittle, F. B. Duke, L. J. Edwards, H. Y. Hoover, G. W. Lynch, G. H. Eubanks, G. L. Allen, J. A. Powers, E. A. Winkler, O. P. Elliott, G. S. Huling, I. L. Pendergraft, J. W. Logan and C. J. Edwards. Were you acquainted with all those parties?

A. Yes sir.

Q. Now state what you know about the contract, if anything, which was made by H. C. Sweet to these parties whose names I have just called?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and to the competency of the witness and the contract being in writing is the best evidence and in fact is pleaded and admitted in the cause.

The COURT: State what you know about the contract.

A. The relation between Mr. Sweet and this deed and contract to the Mangum Star Publishing Co., whatever it was called, came about——

Mr. KEATON: We object to that as incompetent, irrelevant and immaterial and not the best evidence and to the competency of the witness and not responsive to what the court suggested.

53 The COURT: Go ahead.

Exception.

A. Came about in this way. When we had organized, Mr. Eubanks spoke to me, I think in the presence of Dr. Ferguson, I feel pretty sure he was present, in my store——

Mr. KEATON: We certainly object to outside conversations with Mr. Eubanks. Object as incompetent, irrelevant and immaterial.

The COURT: Sustained.

Q. I will show you the contract. Are you one of the parties to to that contract?

A. Yes sir.

Q. State what that Company did under that contract, if anything with reference to carrying the contract into effect?

A. I will have to read the contract first. (After reading:) This is the contract we made with Mr. Sweet.

Mr. KEATON: We object to that as incompetent, irrelevant and immaterial.

The COURT: Overruled. Exception noted.

A. We tried to do something but never did.

Q. State whether the Company collected the notes mentioned in that contract?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Overruled. Exception noted.

A. I don't believe I had the notes. I had the rest of it. I never collected any of them. I believe Mr. Eubanks had them. I don't remember anything about the notes only in a general way.

Q. What position did you hold in the Company?

A. I was secretary or treasurer, may be both, I don't remember.

Q. State whether the Company sold or conveyed any of the lots?

Mr. KEATON: Objected to as above.

The COURT: Overruled and exception noted.

54 A. They did not.

Q. State if the Company abandoned its business and if so, when?

A. They abandoned the business but as to the date I can't give that. It was something inside of a year we dropped the matter after it was taken up.

Q. Did the company ever take possession of any of the lots mentioned in the deed? Claim any ownership?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection sustained. Let him state the facts.

Q. Just state what was done by the Company with reference to carrying out this contract, collecting notes with reference to these lots?

Mr. KEATON: Same objection as above.

The COURT: Overruled and exception noted.

A. We failed to sell any lots. I never had to make a deed. Mr. Sweet's deed was placed in my hands, I don't know whether made to me or the Company, I don't remember but I was to make the deeds, write them up, furnish them to purchasers. I had Mr. Sweet's deed in my possession until after the thing was dropped. He asked me for it and I gave it back to him after the thing had all dropped out, just failed. They stole us all, that is the truth about it; one or two men stole everything. We got disgusted and quit. I gave the deed back to Mr. Sweet and the notes if I had them. I don't nemember having the notes. I think some one else did.

Cross-examination.

By Mr. KEATON:

Q. The reason you could not sell any of those lots,—you say you tried to?

A. We advertised them in the papers in the usual way.

Q. The reason you could not sell was because of a failure of the title of Mr. Sweet, was it not?

55 A. We never had a prospective purchaser.

Q. You don't know that the question of title was discussed by the Company, that Sweet's title was defective?

A. No sir.

Q. When Sweet asked you for the deed, you did not consult any of the other members about it, just handed it to him?

A. Yes sir. The thing had been dis-organized for sometime, the stock sold and I considered the transaction closed.

Q. How much stock was there purchased?

A. I could not tell.

Q. How much money did you put in?

A. It occurs to me I had three shares at $5 a share. I know I had an interest as much as one, may be three shares.

Q. Did you give a note for some additional payments?
A. I never gave a note at all, it was not necessary, the total was only $15.
Q. In fact, the organization of this Company and the buying of the paper and the advertising of the lots was all a part of the consideration for that deed, was it not?
A. No sir. Mr. Sweet was asked to contribute something to the welfare and helping of this institution. They wanted him to give something to that.
Q. That was his offer to the Company?
A. This contract was.
Q. You had bought the paper until after this deed and contract was made, had you?
A. I won't say because it is too long back.
Q. All one transaction?
A. I think two.

Redirect examination:

Q. Mr. Hannah, Mr. Dawson was running the paper prior
56 to the time the Company was organized?
A. Yes sir.
Q. He sold out to the Company, did he not?
A. Yes sir.
Q. There was not anything in that transaction connected with this transaction at the time of the sale of Mr. Dawson to the parties comprising the Mangum Star Publishing Co.?
A. No sir.

Thereupon S. H. TITTLE, a witness of lawful age, on behalf of the plaintiffs, was called to the stand and testified as follows:

By S. B. GARRETT:

Q. What is your name?
A. S. H. Tittle.
Q. Where do you live?
A. Near Mangum.
Q. Where did you live in 1890?
A. In Mangum.
Q. Do you know anything about the contract made by Mr. Sweet and the Mangum Star Publishing Co., in which there was a deed conveying certain interests in certain lots in Mangum to the Publishing Company?
A. Yes sir.
Q. What do you know about it?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial, indefinite and to the competency of the witness to testify under the issues.
The COURT: Overruled and exception noted.

A. It has been so long I have forgotten. I know there was a deed made and contract given by the parties. I heard the contract read.

57 Q. Was there anything done under that contract by the Mangum Star Publishing Co. towards carrying out the terms of that contract the collection of the notes mantioned and the selling of the lots described in it?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

The COURT: State what you know. Exception noted.

A. The lots were advertised through the papers and they tried to collect something on the notes but failed.

Q. What became of the Mangum Star Publishing Co., do you know?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not the best evidence.

The COURT: Overruled and exception noted.

A. They dissolved and the parties sold out their interests in the paper, at least I did. I think the others did.

Cross-examination.

By Mr. KEATON:

Q. You are one of the defendants in this case?
A. No sir, I am not.
Q. You were sued as defendant in this case?
A. No sir, I signed a disclaimer. Yes, I was defeadant.
Q. What was the purpose in getting this paper, what object?
A. Major Dawson was going to leave town, we wanted to keep it here in town. It was decided to buy, keep the paper at home.
Q. Mr. Sweet was a member of your company, was he not?
A. I believe he was. Yes sir.

Redirect examination.

Mr. A. B. GARRETT:

Q. That paper was bought from Major Dawson before any contract made with Mr. Sweet concerning sale of lots and collection of notes?
A. Yes sir, that is my recollection.

58 Recross examination.

By Mr. KEATON:

Q. Don't you know that was all done together?
A. I think not. I think we decided to buy the paper——
Q. You may have decided to buy it but did not buy it until after the contract was entered into?
A. I think we did.
Q. You did not take charge of the paper and was not running it at the time the contract was made and the deed executed, did you?
A. I am not positive about that. I believe we did.

Thereupon H. M. FERGUSON, a witness of lawful age, called on behalf of the plaintiffs, testified as follows:

By Mr. S. B. GARRETT:

Q. Where do you reside?
A. In Mangum.
Q. How long have you resided here?
A. Since 1887.
Q. You have heard the contract read between H. C. Sweet and J. G. Bogard and others composing the Mangum Star Publishing Co.
A. Yes sir.
Q. State whether or not the Company ever sold any of the lots or collected any of the notes mentioned in that contract?
A. They did not.

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not the best evidence and to the competency of the witness.
The COURT: Overruled and exception noted.

Q. State what was done if anything under that contract?
A. Nothing to my knowledge. Something concerning
59 titles to land and records were not allowed to be made.
Q. You are the H. M. Ferguson mentioned in this contract?
A. Yes sir.
Q. And a member of the Company?
A. Yes sir.
Q. Was there any other different consideration than that mentioned in this contract for the deed given by H. C. Sweet and Anna Sweet to the Mangum Star Publishing Co. for the lots described in the deed?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and to the competency of the witness and not the best evidence.
The COURT: Overruled and exception noted.

A. No sir, not to my knowledge.
Q. What became of the Mangum Star Publishing Co.?

Mr. KEATON: Same objection, ruling and exception.

A. It passed out of existence.

Cross-examination:

Q. How long did you maintain the paper?
A. I don't remember how long it was, not a great while.
Q. I will ask you if this is not a fact. You said something came up from Texas by which the question of Mr. Sweet's title was raised wasn't it that the Texas Supreme Court decided that a similar patent to that under which Mr. Sweet held this land was void and it therefore affected the title to the land?
A. My recollection is that it was some instructions from the State to the County officers not to record deeds or have anything to do with land transactions or something of the kind.

Q. You advertised this property for sale?
A. Yes sir.
Q. This notice came from the State officers?
A. It came from the State officers to our County officers.
60 Q. You did not have anything to do personally with the managing of this paper?
A. No sir, Nothing further than possibly advisor or something like that. No active work.
Q. You bought stock in it?
A. Yes sir.
Q. How much?
A. I believe I did not have over five or six shares.
Q. You did advertise this property for sale?
A. Yes sir, I think a short time after we bought the stock.
Q. You say there was no other consideration for this transfer except that mentioned in the deed and contract?
A. None to my knowledge.

An adjournment was then taken until Tuesday morning, August 18, 1903, at 9 o'clock, at which time the case was resumed and the plaintiffs continued the introduction of their testimony.

Thereupon R. C. HANNAH was recalled and testified as follows:

By A. R. GARRETT:

Q. State whether or not there was any other consideration for the lots mentioned in the deed executed by H. C. Sweet and wife to the Mangum Star Publishing Co., composed of J. G. Bogard and others than that of collecting the notes and selling the lots mentioned in the deed?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and the witness having already gone over this question fully yesterday, and to the competency of the witness.
The COURT: Overruled and exception noted.

A. There was never any other consideration to my knowledge. I was never called on to pay anything for it in any way. That was the terms of the contract agreed upon among ourselves before I saw the deed.
Q. When you speak of yourselves do you mean the par-
61 ties composing this company?
A. Yes sir. We wanted the old man to give us part of these lots.

Mr. KEATON: We object to any oral conversations or wants.
The COURT: Sustained.

Q. Who first settled the 160 acres of land upon which these lots were located?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.
The COURT: Let him answer. Exception noted.

A. Sweet was on it and claiming it. That is all I know about it.

Q. Do you know whether or not he had cultivated it prior to the 16th day of March, 1896?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

The COURT: What is the purpose of that?

Mr. GARRETT: To show that Mr. Sweet acquired this land of the United States, that he was in adverse possession of it in 1896 as far as these parties are concerned and that under and by virtue of an Act of Congress he acquired it as prior settler, under act of January 1897.

The COURT: Is there a record showing that fact, that he acquired title?

Mr. GARRETT: Yes sir, there is a record showing he acquired title.

The COURT: Objection overruled. Exception noted.

A. I cannot remember about how the lines run on this quarter Mr. Sweet was living and cultivating a farm on the Eastern portion of the town, whether that is in this town proper or not I don't know. Also an orchard and plot still further West, I think they were in this town property.

Q. Now with reference to the lots mentioned in the deed of H. C. Sweet and Anna Sweet to J. G. Bogard and others, state
62 whether or not that Company ever took any possession adverse to Mr. Sweet of those lands?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not within the issues and to the competency of the witness.

The COURT: Overruled. Exception noted.

A. None to my knowledge.

Q. Have you lived here in the town of Mangum and been in business and familiar with the conditions existing in Mangum since this deed was executed?

A. Yes sir.

Cross-examination.

By Mr. KEATON:

Q. You are one of the defendants in this case, are you not?

A. I think not.

Q. You were sued in this case?

A. I don't believe I was, might be. I am not able to answer that, I don't know. I gave a quit claim deed to that and I supposed that ended my part of it.

Q. You were originally named as one of the defendants?

A. Possibly so.

Q. Afterwards gave a quit claim deed?

A. Yes, and considered myself out of the question.

Q. You gave the deed after you knew the suit was commenced?

A. I don't remember.

Thereupon the plaintiffs rest their case and the defendants presented the following demurrer to the evidence presented by the plaintiffs, and filed the same on the 18th day of August, 1903;

63 TERRITORY OF OKLAHOMA, *County of Greer, ss:*

In the District Court.

No. 276.

F. H. SWEET ET AL., Heirs of H. C. Sweet, Plaintiffs,
vs.
J. G. BOGARD ET AL., Defendants.

Demurrer to Evidence of Plaintiffs.

Comes now defendants, J. G. Bogard, J. H. Simpson, H. Y. Hoover, L. J. Edwards, G. S. Huling, S. C. Van Leer, J. A. Powers, M. C. Logan, *pro se* and as mother and next friend of Addie V. Logan and James W. Logan, minor heirs of J. W. Logan, deceased, Belle Pendergraft, *pro se* and as mother and next friend of Claude D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Ison P. Pendergraft and William Pendergraft, minor heirs of I. L. Pendergraft, deceased, and demur to the evidence of plaintiffs upon the ground that said evidence wholly fails to establish any cause of action against these defendants, but, on the contrary, affirmatively shows that said defendants are entitled to the relief prayed for in their answer.

SHARTEL, KEATON & WELLS,
Attorneys for Above-named Defendants.

64 which demurrer to the evidence was by the Court overruled, to which the defendants excepted.

The following evidence was then produced on behalf of the defendants:

L. J. EDWARDS, a witness of lawful age, being duly sworn, testified as follows, in answer to questions propounded by Judge Keaton:

Q. Where do you live?
A. Out here in North Mangum.
Q. How long have you resided in or near Mangum?
A. For the last seven or eight years.
Q. You are one of the defendants in this action?
A. Yes sir.
Q. You know about the deed and contract that has been read here being executed?
A. Yes sir, I have heard of it.
Q. Do you know, Mr. Edwards, whether or not that deed and contract were executed before or after you bought this Mangum Star Publishing Co.?
A. All the same time is my understanding of it.

Q. Do you know whether or not the deed was a part of the inducement to cause you to buy into that paper and take charge of it?
A. Yes sir, Mr. Sweet offered to do that to get us to buy this paper.
Q. How much money was paid for the paper?
A. I don't know how much was paid. I paid my part $10.
Q. You paid $10?
A. No, sir, I paid my part.
Q. Your part of the $10 that went to Mr. Sweet?
A. Yes sir.
Q. Then you know about that $10 being paid to Mr. Sweet?
A. Yes, sir, paid right up in this old wagonyard here.
65 Q. Did you put up your part at the time?
A. Yes sir.
Q. How much money did you put into the paper?
A. I forget now. I had about the biggest share of any I think. About four or five shares.
Q. You know what each share was worth?
A. $5 each.
Q. Now, Mr. Edwards do you know of anything else that was done by your Company as part consideration for this deed?
A. Running this old paper here for a long time.

Mr. GARRETT: We object to the witness testifying to transactions that occurred between the company and H. C. Sweet and we move the Court to exclude the evidence of the witness in which he stated that he paid his part of the $10 to H. C. Sweet over in a wagon yard for the reason that the proof shows H. C. Sweet is dead and he cannot testify to transaction between the company and H. C. Sweet when the matters are in controversy between Sweet's heirs.
The COURT: Overruled. Exception noted.

Q. What else was done under this contract, if anything and in pursuance of it in addition to running the paper as part of the consideration?
A. Build up this town. This old court house and jail I think was part. We kept the county seat here, that was what the old man was after. Gave us an interest in the lots to hold the county seat here. They were trying to move it.
Q. How much money was put into that jail or court house?
A. I think about $700 made up here.
Q. Did this company put that money in?
A. Yes, sir and a few outsiders put some in.
Q. How much money did you put into that if any?
66 Mr. GARRETT: We object to that as being incompetent, irrelevant and immaterial.
The COURT: Answer the question. Exception noted.

A. I put in first $50 and they came to me again and I put in some more, some people having failed. Paid $50 to Mr. Eubanks when the thing started.
Q. That is, Mr. Eubanks a member of your company?
A. Yes sir.
Q. I want to ask you whether or not you would have purchased

this stock in this paper and gone into the Company and put up the money to build the court house and jail but for the fact of Mr. Sweet having given you the lots under this deed, an interest in this property?

Mr. GARRETT: Objected to as calling for the conclusion of the witness and as incompetent, irrelevant and immaterial.

The COURT: Let him answer. Exception noted.

A. No sir, I would not if not for the interest in the lots.

Q. Did you ever authorize Mr. Hannah or anybody else to rescind this contract that you had with Mr. Sweet and turn him back any of these notes or that deed for you?

A. No sir, I went to Mr. Hannah to get the deed after they sued us and he had turned it over to Mr. Sweet.

Q. You supposed that the deed was still in the hands of the company or some of its members?

A. Yes sir.

Q. Did you ever have a meeting of the members of your Company and take action on that matter as to whether or not they would rescind the contract with Mr. Sweet?

A. No, sir, I don't remember any.

Q. If there was any such meeting as that and any action as that you were not present and did not know anything about it?

A. That is correct.

67 Cross-examination.

By Mr. A. R. GARRETT:

Q. You say you paid your part of the $10 to Mr. Sweet?

A. Yes sir.

Q. How much did you pay him?

A. I don't recollect, about 50 cts. or $1.

Q. Who was present?

A. Whole house full of people.

Q. All the members of this company?

A. I don't recollect whether all the members were there or not. Part collected afterwards.

Q. Who was present besides yourself and Mr. Sweet?

A. I don't remember.

Q. Just mention one present?

A. Mr. Logan.

Q. Mention another man who was there and is living?

A. I think Mr. Simpson was there, good big crowd. I thought all were there.

Q. Who else beside Mr. Simpson?

A. Judge Huling.

Q. Who else?

A. I don't remember. There were others present besides the members of this company.

Q. Was Mrs. Anna C. Sweet there?

A. No, sir, never in the house while doing business that I know of.

Q. Now you have answered that you bought this Mangum Star

paper after this deed was made. Is it not a fact that Mr. Dawson proposed to sell that paper and there was a Company organized to buy that paper and did buy it before any deed was made?

A. No sir, Mr. Sweet was the very first man that said anything about it. He got me into it.

68 Q. Is it not a fact that there was not any such a thing as this contract or this deed for these lots being given until after Mr. Dawson's paper was bought up and he left the town?

A. No sir, that was not the first. I always thought Mr. Sweet and Mr. Dawson was in together.

Q. You never set up any claim to this land?

A. I never have released any. No, sir.

Q. Did your company ever render any of this land for taxes?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Overruled. Exception.

A. No, sir.

Q. Did you ever pay any taxes on it?

Mr. KEATON: Same objection, ruling and exception.

A. No, sir.

Q. Is it not a fact that you, J. Powers and others never set up any claim to this land in any manner or claimed to have any interest in it until after you had started a town on the north side of these lots named North Mangum?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Objection overruled and exception noted.

A. I claimed it all the time.

Q. Is it not a fact that in booming your side of this town your partner, Mr. J. Powers in your presence, began discussing the fact that there was a deed on record to J. G. Bogard and others among them yourself and therefore the title to this part of the town was not good and is it not the first time you ever set up any claim to these lots?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and hearsay evidence.

The COURT: Let him answer. Exception noted.

69 A. No, sir, it is not.

Q. Did you ever take any possession of any of the lots mentioned in that deed.

A. No sir, Mr. Simpson and I talked about it.

Q. Don't you know as a matter of fact before H. C. Sweet could enter this quarter section of land upon which these lots are located that it would be necessary for him to advertise in the papers here thirty days' notice to any one who had adverse claim or claimed any interest in any of the lots to file their objections with the local land office before he was permitted to make the entry?

A. I knew he had to do that, yes, sir.

Q. Did you ever come and file any protest or set up any claim or interest at the time this notice was published or before the 30 days run out?

A. No, sir, I did not, but I kept a man from doing so.

Q. You never appeared at the Land Office and filed any protest or objection or set up any claim of interest to any of the lots mentioned in the deed or any portion of the quarter section upon which these lots are situated, did you?

A. No, sir.

Q. Did any of your associate defendants make any objection within your knowledge to the Land Office to Sweet's entering the lots?

A. No, sir, they did not go to the Land Office.

Q. You knew as a matter of fact that Mr. Sweet for a number of years had in cultivation a portion of the quarter section upon which these lots are situated?

A. No sir.

Q. Didn't you know as a matter of fact that on the 40 acre block S. E. of the jail *with* composes 40 of the 160 acres mentioned in this suit that he did have a portion of it in cultivation for a long
70 number of years prior to the 16th day of March, 1896 up and after the time he entered into possession thereof?

A. Jim Logan had some there.

Q. I was asking you if Mr. Sweet did not have a portion of it in cultivation?

A. Not, that I know of.

Q. Didn't Mr. Sweet have a little patch of land on these lots in cultivation prior to the 16th day of March, 1896?

A. No sir, I did not think it was him. Albert had some and Frank had some. They claimed it.

Q. Who is Albert you mention?

A. Albert Sweet, brother of H. C. Sweet.

Q. Who is Frank?

A. Frank Sweet, son of H. C.

Q. Was Frank Sweet living with his father at this time and unmarried.

A. Yes sir.

Redirect examination.

By Mr. KEATON:

Q. You say you did not protest against Mr. Sweet making entry on this land but kept another party from protesting, why did you do that?

A. He promised to make all this title good——

Mr. GARRETT: We object to any promise that he may claim Mr. Sweet made to him.

The COURT: Overruled. Exception noted.

Recross examination.

By Mr. A. R. GARRETT:

Q. With reference to the party that you kept from filing a protest that was Sam Hall was it not?

A. Yes, sir.

Q. And Sam Hall had originally bought three lots from
71 H. C. Sweet not embraced in these lots mentioned in this deed now in controversy had he not?

A. He bought three lots and sold those lots to me.

Q. And those three lots were not embraced in this deed?

A. I don't think they are.

Q. As a matter of fact you know they are not?

A. At that time they were not.

Q. They are not included in the lots conveyed by H. C. Sweet and his wife to J. G. Bogard and others?

A. No, sir, I think not.

Q. The reason why you wanted to keep Hall from protesting was because you wanted Hall to make your title to the lots later on.

A. He put the land up to me and could not make a deed to me.

Q. He had put the lands up as security?

A. Yes, sir.

Q. You wanted Hall's title to be made good so that the title to you would be good and you kept Hall from protesting upon the understanding with Mr. Sweet that he would make a good title when he acquired a patent from the United States?

A. He said he would make all titles good.

Q. In that transaction it was dollars and cents to you to have Mr. Hall not protest, was it not?

A. Dollars and cents all the time with me.

Q. I mean in that particular transaction the reason you kept Hall from protesting, persuading him not to protest, was in order that you could acquire a good title?

A. These lots and other lots.

Q. I mean these particular lots?

A. Yes, sir.

Q. Were there any other lots?

72 A. Mr. Sweet said he would make all these title good if we would let him purchase this townsite.

Q. Was there ever any mention of his making the title good to these J. G. Bogard *et al.* lots involved in this controversy?

A. No, sir, he did not say anything about these particular lots.

Q. He had been exercising control over all of this property mentioned in this deed and you and your company had never undertook to exercise any control over it since the deed was made, had you?

A. Yes, sir, we advertised it a long time.

Q. Did you run the paper?

A. No, sir.

Q. Mr. Eubanks ran it, didn't he?

A. No, sir, not all the time. I never ran it. Fellow named Williams ran it, and others.

Thereupon J. H. SIMPSON, a witness of lawful age, being sworn, testified on behalf of the defendant as follows:

Direct examination by Mr. KEATON:

Q. State your name?
A. J. H. Simpson.
Q. Where do you live?
A. In Greer County.
Q. You are one of the defendants here in this case?
A. I am.
Q. You remember about the execution of this deed from Mr. Sweet to your Company and the contract by your Company?
A. I do.
Q. When was this deed and this contract executed with reference to the time that you became a member of this Publishing
73 Company?

A. This question was first called up of buying the Star out, and the contract entered into the latter part of 1890 and the first of 1891 along somewheres near the holidays, the latter part of 1890 and the first part of 1891. I don't remember the exact date.

Q. I want to know whether the contract and deed were executed before or after or at the same time you bought out this paper?

Mr. GARRETT: Objected to as leading and suggestive.
The COURT: Overruled and exception noted.

A. I cannot answer that question.
Q. Was this deed executed before or after you bought this Star out?
A. It was after we bought the Star out.
Q. Had it been agreed on before?
A. Yes, sir, it was agreed on before, the transactions were side by side.
Q. Now then how much money, if any did you put into this Star in pursuance of this contract.

Mr GARRETT: Objected to as incompetent, irrelevant and immaterial.
The COURT: Overruled and exception.

A. I had three shares. I don't remember exactly what a share was worth. It seems to me it was $25. I paid for 3 shares.
Q. Were those shares all paid out at once or how was that?
A. Each party agreed to take so many shares and notes were given in payment.
Q. The first payment of each shar- was $5 was it not?
A. That is my memory of it.
Q. The rest of the $25 was paid in installments?
A. I remember paying the last payment off myself.
Q. Do you know who received the deed that was executed by Mr. Sweet and wife which particular member of your Com-
74 pany?

A. It is my impression that Mr. Logan had it in his custody.

Q. Mr. Logan is dead, isn't he?

A. Yes sir, Mr. Logan and I made the first contract with Mr. Sweet. We went from a meeting of the members of the Company to see Mr. Sweet to see what he would do and we were to make a report to the Company on our return.

Q. That is the other members of the Company were waiting?

A. Yes, sir.

Q. At the time you and Mr. Logan went to see Mr. Sweet had you purchased the paper or not?

A. No, sir, the deal had not been closed.

Q. You closed it shortly after?

A. After our report, yes, sir.

Q. Was there any other consideration performed or paid by the members of your so-called Company other than the effort to collect these notes mentioned in this contract and sell the lands mentioned therein?

A. I think so.

Q. What was it?

A. I remember paying my part of a consideration. I paid my part of the consideration in that deed to Mr. J. W. Logan when I signed the contract.

Q. You mean the $10 consideration?

A. Yes sir.

Q. Was there anything done by the members of your Company in addition to that in the way of holding the county seat here, etc.

Mr. GARRETT: We object as being wholly immaterial and irrelevant.

The COURT: Overruled and exception noted.

A. Yes, sir.

Q. What was done in that regard?

A. One effort was made to move the county seat from this
75 point wherein I for one and men around here about Mangum took active steps in working day after day in the effort to keep it here. Another action was taken——

Mr. GARRETT: We object to his stating his actions.

The COURT: Objection sustained.

Q. What did your company do if anything as part of the consideration for this deed?

Mr. GARRETT: Objected to as leading and suggestive.

The COURT: Let him answer. Exception noted.

A. We bought that press, retained it here, hired men to run it and ran it.

Q. State whether or not any effort was made to collect these notes mentioned in this contract?

A. Mr. R. C. Hannah was appointed by the Company to do this business. I don't know what effort he made.

Q. Did you or the members of your Company contribute anything to the building of this court house and jail?

Mr. GARRETT: Objected to as being incompetent, irrelevant and immaterial.

Q. Was that a part of the consideration for this deed. What was the consideration?

A. The consideration of the deed from Mr. Sweet was to take the stock buy this paper out, retain it here and help to upbuild Mangum and he in lieu thereof, remunerate us with an interest in this town. That was the agreement.

Q. You stated in answer to some question about moving the county seat at the time. Did it come up at that time or afterwards.

A. The fight came on afterwards.

Q. Did you ever authorize Mr. R. C. Hannah or anbody else to make any rescission of this contract and deed you had made with Mr. Sweet or to return him the deed?

76 A. I did not.

Q. Did you at any time abandon or relinquish your interest in this real estate that had been conveyed to you?

Mr. GARRETT: Objected to because leading.

The COURT: Overruled and exception noted.

A. No, sir.

Cross-examination.

By A. R. GARRETT:

Q. Did you ever assert any claim or right or interest in any of the lots involved prior to the filing of this suit in any manner?

A. Yes, sir.

Q. How did you assert it?

A. By a declaration that I had an interest in the warranty deed to the different parties.

Q. Mr. Powers was the first party who spoke to you of a warranty deed being in existence to you and others did he not?

A. No sir.

Q. That was after Mr. Powers and Mr. Edwards had established the rival town of Mangum on the north side of the railroad was it not?

A. No sir.

Q. You have been a citizen of this town and community since 1890 have you not?

A. Since 1887.

Q. Since the making of this deed on Feby. 10, 1891 you have lived in Mangum and near to it, have you not?

A. I have.

Q. State whether or not you or your Company ever took control or possession of any of the property involved in this suit?

A. Yes, sir.

Q. What kind of possession did you take?

77 A. Took absolute possession of the property the Star sets on. Not the Star Office now but where it used to be.

Q. I will ask you if that Star office was not situated upon land

excepted from this conveyance or deed conveying the lands in controversy?

A. I understood that the Star office building was with the Company property.

Q. I will ask you if that Company at that time ever made any deed for that property to any one?

A. Not that I know of.

Q. I will ask you if that property has not been sold time and time again and that you never have asserted any right, title or interest to any part of it?

A. I don't know anything about any change in the title.

Q. Did the Mangum Star Publishing Co. cease to have any existence as a company sometime during the year 1891 after this deed was made and executed?

A. Not that I have any knowledge of.

Q. Did the Company ever have any Board of Directors?

Mr. KEATON: Objected to as immaterial and as it is a partnership.

The COURT: Sustained.

Q. I will ask you if the Company did not sell out its interest in the paper to Eubanks and Thacker?

A. I think most of the individual members, if not all, sold out their interests in the paper to those persons.

Q. And they got paid for those shares or interests they had in the Star?

A. I got paid for mine.

Q. You sold your stock in the Company when you sold out to Mr. Eubanks and Mr. Thacker?

78 A. I did not.

Q. Did you have the shares of stock issued to you?

A. Yes sir, we had a receipt showing the shares, I think.

Q. Have you those receipts now?

A. I don't know whether I have got mine yet or not. I suppose I have somewhere among my papers.

Q. Did your Company ever perfect any organization by getting a charter from the State of Texas incorporating it?

A. I do not know. I think it did not.

Q. Who was in possession of the lands in controversy and claimed possession of them on the 16th day of March, 1896?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not within the issues in this case.

The COURT: Let him answer. Exception noted.

A. I do not know. The United States Government I suppose.

Q. Was there any one living on this land and occupying these lots at that time?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not within the issues in this case.

The COURT: Overruled. Exception noted.

A. On a part of these lots there were people.

Q. Had you or your company ever collected any rents from the parties living on these lots?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial.

The COURT: Overruled and exception noted.

A. Not that I know of.

Q. State whether or not you or your Company ever paid any taxes on any of the lots mentioned in the controversy.

Mr. KEATON: Objected to as above.

To which same ruling was made and exception noted.

79 Q. I will ask you as a matter of fact if the county seat fight did not come off in 1895?

A. It was along about that time, '94 or '95.

Q. I will ask you as a matter of fact if the county seat fight did not come up before the people of Mangum at the time this contract and deed was made?

A. It was afterwards. It had been put before me by Mr. Sweet himself. When the county seat fight came up we took up the subscriptions to build a public school house and jail and other buildings.

Q. You speak of contributions to build public school houses and jail. I will ask you if that was not a public subscription to which citizens outside of the Company contributed?

A. That is my understanding and knowledge. Others contributed as well as the Company.

Q. You do not know whether all the members of your company contributed or not, do you?

A. I do not know one that did not.

Q. You do not know whether all of them did?

A. I think they all did, every one of them.

Q. How much did J. A. Powers pay?

A. I could not tell.

Redirect examination.

By Mr. KEATON:

Q. You were asked if your Company or any of them paid any taxes on these lots. You did not pay any until it became a part of Oklahoma?

A. We never paid any.

Q. Never paid any to the State of Texas?

A. No, sir, I never paid any and don't know anybody that did.

Recross examination.

By Mr. GARRETT:

80 You did not know whether Mr. Sweet paid any taxes or not?

A. No, sir, I do not.

Thereupon G. S. HULING, a witness of lawful age, on behalf of the defendants, testified as follows in answer to questions propounded by Mr. Keaton:—

Q. Where do you live, Judge?
A. In Mangum.
Q. How long have you resided here?
A. About sixteen years. I have not been in town altogether.
Q. You are one of the defendants in this suit of Sweet and others *vs.* Bogard and others?
A. Yes, sir.
Q. A member of this so-called Star Publishing Company?
A. Yes, sir.
Q. You were living here in 1890 and 1891 when this deed was made?
A. Yes, sir, I was here then in town.
Q. How much, if any interest did you take in this Company?
A. I had two shares.
Q. Do you know how much a share was worth?
A. I think $10 a share, altogether I paid $20, that is what I was out.
Q. How long did this Company exist?
A. I don't know just how long they did run.
Q. Give your best recollection?
A. As far as the Company was concerned, I don't know.
Q. Up to the time that the paper was disposed of how long did he run up to that time?
A. I could not say positively; not two years, a year or two
81 years, may be not so long.
Q. As a member of that Company did you ever at any time authorize Mr. Hannah to make rescission of this contract and deed with Mr. Sweet or return him the deed?
A. No, sir.
Q. What was the consideration for that deed?
A. The consideration of the deed was that we were to buy the Star and advertise the town in a general way and dispose of land and do everything we possibly could to hold the county seat at Mangum.
Q. Did you use your best efforts to do that?
A. Yes, sir, we bought the Star, ran it in the interests of the town did quite a lot of advertising all over the State of Texas, sent out circulars, such things.
Q. Your company did that?
A. Yes, sir.
Q. You advertised these lots for sale?
A. Yes, sir.
Q. What else if anything did the members of your Company do in the way of keeping the county seat from being moved?
A. We had a county seat fight after that and the Company did what they could and other citizens did too. I don't know whether building this jail down here was done by the Company or not. I

know I made a compromise and they built the building. Other people donated as we did and it was a general interest.

Q. Did you put up any of the money consideration that was expressed in the deed as having been paid?

A. Yes, sir.

Q. How much?

A. I think it was $1 my share of it.

Q. You put up your share?

82 A. Yes, sir. We had a meeting down there in the old court house. Mr. Logan and Mr. Simpson brought that question up of the consideration being paid.

Q. Was all the money raised there?

A. I don't know whether it was or not. My part was then paid. I paid it to Mr. Logan.

Q. Has any of that money or any money that you put into this Star Publishing Co. ever been paid back to you by Mr. Sweet or anybody else or tendered back?

A. Never got a cent.

Q. Anybody ever tender you any money back?

A. No, sir.

Cross-examination.

By Mr. GARRETT:

Q. When was the Mangum Star bought out by the Company that you formed a member of?

A. I am a poor hand to remember. It was while I was County Judge here, in 1890 or 1891.

Q. I will ask you if as a matter of fact it was not bought prior to December, 1890?

A. I could not tell. It was while I was here. I could not tell without the records.

Q. It was bought before any deed was made from Mr. Sweet to J. G. Bogard yourself and others and before the contract was entered into by which that Publishing Company was to advertise Mangum, was it not?

A. I could not tell. I know they got up the Company and know they took stock in it.

Q. You say you paid your part of the consideration expressed in the deed. What is the consideration expressed in the deed?

A. I don't know. I think my part of the consideration 83 was about $1 and that the consideration was $10.

Q. Who was present when you paid it?

A. Mr. Logan and Mr. Simpson and I think Mr. Francis was there.

Q. You paid to Mr. Logan, did you?

A. Yes, sir, and Mr. Simpson was there also.

Q. Was Mr. Logan County Clerk?

A. Yes, sir.

Q. Did Mr. Logan collect all the money you saw paid that day?

A. I don't know whether he got it all or not. It was all collected on that day.

Q. When did your Company dissolve as a partnership and cease to have existence as a Company?

A. I don't know.

Q. You were Probate Judge of Greer County in 1890 and 1891?

A. Yes, sir, 1890 and 1891.

Q. In the fall of 1890 the Commissioners' Court authorized you to enter into a contract and agreement with the citizens of Greer County to rebuild the jail and court house, did they not?

A. They authorized me to go to Vernon and compromise the suit then pending in the Court of Appeals.

Q. They also authorized you to contract with the citizens for subscriptions to rebuild the court house, did they not?

A. Yes, sir.

Q. There was no order authorizing you to contract with the Mangum Star Publishing Company, was there?

A. I do not remember, do not know anything about it. It had to be done by act of the Commissioners' Court.

Q. You knew that Mr. Sweet was in possession of the land in controversy and exercised ownership and control of it up to the commencement of this suit since 1891, did you not?

84 Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not within the issues in this case.

The COURT: Overruled and exception noted.

A. I did not know anything about it. I did not know whether old man Sweet had any title to the land or not. There was no objection raised to it.

Q. You never set up any claim to these lots in any manner prior to the commencement of this suit?

A. Never.

Q. Never claimed any interest in these lots in any manner?

A. No, sir, I knew I had some money in this contract.

Q. The money you had was in the Star Publishing Company, was it not?

A. Yes, sir, and deed was given to us in consideration of that. I knew we had a deed to the property.

Q. When was the first time you knew that a deed was in existence and of record?

A. When we organized the Company we knew there was a deed.

Q. After the Company had ceased to do business when was the next time your attention was called to the fact that there was a deed to the lots?

A. When Mr. Frank Sweet brought suit against us to perfect title.

Q. Up to that time you made no claim to any of the lots involved in this suit?

Mr. KEATON: We object as incompetent, irrelevant and immaterial.

The COURT: Overruled and exception noted.

A. No, sir.

Q. It was your understanding as a member of that partnership was it not that the contract between the partnership and Mr. Sweet had been abandoned?

85 A. I do not know anything about it, whether abandoned or not.

Q. It had been abandoned, had it not?

A. I don't know.

Q. So far as you are a member of that partnership it had been?

A. I just about expected I never would get anything out of it.

Redirect examination.

By Mr. KEATON:

Q. You started to make an explanation to one of Mr. Garrett's questions when he asked you why you did not object to Mr. Sweet's possession if you claimed any interest?

A. Because I knew if we had protested against it Mr. Sweet could not perfect the title. Mr. Sweet agreed if we would let him go on he would make his title good. So far as I know he made the title good.

Recross-examination.

By Mr. A. R. GARRETT:

Q. You did not know anything about any protest or your right to protest against his entry to these lots, did you?

A. We talked about it a certain day when Samuel Hall was trying to get it.

Q. Did you have a meeting of the members of that Company?

A. No, sir, just a private conversation.

Q. Did you know at the time this deed was of record?

A. Yes, sir.

Q. Did you examine the deed?

A. No, sir, I never did.

Q. Who did you talk with?

A. Mr. Simpson.

Q. Where was it at?

A. In town somewhere. I thought they ought to go on,

86 let Mr. Sweet perfect his title.

Q. You never went to Mr. Sweet or any of the members of your company after he obtained patent to these lots and demanded any deed from him?

A. No, sir, I never did. I don't know whether the rest did.

Thereupon the defendant rested his case.

In rebuttal the plaintiff offered the following testimony:

R. C. HANNAH:

By Mr. A. R. GARRETT:

Q. I will get you to examine these receipts. When were they placed in your possession and what are they?

A. They came into my possession at various times.

Mr. KEATON: We object to his stating what they are.

The COURT: I suppose they each show that.

Mr. GARRETT: We now offer in evidence a receipt from J. W. Logan to R. C. Hannah for $5 as 20% payment of a share in the Mangum Star Printing & Publishing Association, dated November 26, 1890 and ask it be marked Exhibit A.

Mr. GARRETT: We now offer in evidence a receipt from J. W. Logan to E. R. Fletcher for $5 as 20% payment of a share in the Mangum Star Printing & Publishing Association, dated November 22, 1890, and ask it be marked Exhibit B.

Mr. GARRETT: We now offer in evidence a receipt to H. M. Ferguson from J. W. Logan for $5 as 20% payment of a share in the Mangum Star Printing & Publishing Association, dated November 26, 1890, and ask it be marked Exhibit C.

Mr. GARRETT: We now offer in evidence a receipt from J. W. Logan to O. P. Elliott for $5 as 20% payment of a share in the Mangum Star Printing & Publishing Association, dated November 26, 1890, and ask it be marked Exhibit D.

We now offer in evidence a receipt from J. W. Logan to
87 E. A. Winkler for $5 as 20% payment of a share in the Mangum Star Printing & Publishing Association, dated November 26, 1890, and ask it be marked Exhibit E.

Q. Were those receipts given for the payment of one fifth interest in a share of the Mangum Star Printing & Publishing Association?

A. Yes, sir, for that purpose, as expressed on the face of them.

Q. When was the Magnum Star purchased by this association of persons of whom you formed a member?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and repetition and not proper rebuttal.

The COURT: Let him answer. Exception noted.

A. I cannot answer.

Q. State whether or not it was prior to the date mentioned on these receipts?

A. Yes, sir.

Mr. KEATON: It was about the time of the execution of these receipts, was it not?

A. Those receipts are of different dates.

Mr. GARRETT: Who contributed to the rebuilding of the court house and jail in Mangum in 1890?

A. The citizens of the town and the Company.

Q. Was the rebuilding of that jail any part of the consideration for a deed to the lots mentioned in the deed in this case?

A. Not to my knowledge.

H. M. FERGUSON (recalled).

By Mr. GARRETT:

Q. State whether or not the rebuilding of the court house and jail in Mangum was a part of the consideration for the execution of the deed from H. C. Sweet and wife to J. C. Bogard and others constituting the Mangum Star Publishing Association?

88 A. Not in the least.

Q. State whether or not the Mangum Star was bought by this association of people prior to the date of the execution of the contract and deed mentioned in this suit?

Mr. KEATON: Objected to as incompetent, irrelevant and immaterial and not proper rebuttal.

The COURT: Overruled and exception noted.

A. It was before.

Q. State whether or not the buying of the Mangum Star was any part of the consideration for the making of this deed by Mr. Sweet and wife to this Company?

Mr. KEATON: Same objection.

Overruled and exception noted.

A. No part of it.

Cross-examination.

By Mr. KEATON:

Q. Do you know that Mr. Simpson and Mr. Logan had gone to see Mr. Sweet prior to the time you bought this paper and when you were having a meeting and it was on their report back to the meeting of the members of this Company as to what Mr. Sweet had agreed to do that the property was purchased?

A. No, sir, the circumstances of the purchase of the paper was to prevent the county seat being moved.

Q. Do you remember Mr. Logan and Mr. Simpson going from the meeting before you bought the paper to see Mr. Sweet to see what he would do?

A. I don't remember.

Q. You did not say they did not go?

A. No, sir.

Thereupon the plaintiffs rested and the case was declared closed.

After hearing the arguments of counsel, the court decided for the plaintiffs.

89 TERRITORY OF OKLAHOMA, *County of Greer:*

I do hereby certify that the foregoing and annexed copy of the proceedings in the case of Sweet *et al. vs.* Bogard *et al.*, No. 276, is a true and correct copy of the evidence taken by me in the trial

of said cause in short-hand and by me transcribed into typewriting, and the exhibits produced in evidence in said cause.

THOMAS R. CLIFT,
Court Stenographer.

Filed Oct. 15, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

90 EXHIBIT "A."

No. 14. MANGUM, TEXAS, *Nov.* 26, 1890.

Received of R. C. Hannah the sum of Five Dollars the same being for 20 per cent. of one share in the Mangum Star Printing & Publishing Association and being the 1st payment thereon.

$5.00.

J. W. LOGAN, *Secretary.*

EXHIBIT "B."

No. 3. MANGUM, TEXAS, *November* 22, 1890.

Received of E. R. Fletcher, the sum of Five Dollars the same being for 20 per cent. of one share in the Mangum Star Printing & Publishing Association and being the 1st payment thereon.

$5.00.

J. W. LOGAN, *Secretary.*

EXHIBIT "C."

No. 13. MANGUM, TEXAS, *Nov.* 26, 1890.

Received of H. M. Ferguson the sum of Five Dollars the same being for 20 per cent. of one share in the Mangum Star Printing & Publishing Association and being the 1st payment thereon.

$5.00. J. W. LOGAN, *Secretary.*

91 EXHIBIT D.

No. 16. MANGUM, TEXAS, —— 26, 1890.

Received of O. P. Elliott the sum of Five Dollars the same being 20 per cent. of one share in the Mangum Star Printing & Publishing Association and being the [illegible] payment thereon.

$5.00. J. W. LOGAN, *Secretary.*

EXHIBIT E.

No. 15. MANGUM, TEXAS, *Nov.* 26, 1890.

Received of E. A. Winkler the sum of Five Dollars the same being 20 per cent. of one share in the Mangum Star Printing & Publishing Association and being the 1st payment thereon.

$5.00. J. W. LOGAN, *Secretary.*

92 And thereafter and on the 21st day of August, 1903, defendants filed their motion for a new trial, which said motion is in words and figures following, to wit:

93 TERRITORY OF OKLAHOMA, *County of Greer, ss:*

In the District Court.

No. 276.

F. H. SWEET ET AL., Heirs of H. C. Sweet and Anna Sweet, Deceased, Plaintiffs,

vs.

J. G. BOGARD ET AL., Defendants.

Motion for New Trial.

Comes now defendants, J. G. Bogard, J. H. Simpson, H. Y. Hoover, L. J. Edwards, G. S. Huling, S. C. Van Leer, J. A. Powers, M. C. Logan *pro se* and as mother and next friend of Addie V. Logan and James W. Logan minor heirs of J. W. Logan, deceased, Belle Pendergraft, *pro se* and as mother and next friend of Claude D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Isom P. Pendergraft and William Pendergraft, minor heirs of I. L. Pendergraft, deceased, and move the Court to vacate and set aside its finding and decision, this day rendered by said Court in favor of plaintiffs in said above entitled action and to grant said above named defendants a new trial thereof for the following reasons, which affect materially their substantial right, to wit:

(1) The said finding and decision is contrary to the evidence.

(2) The said finding and decision of said court is contrary to law and to the weight of the evidence.

(3) The said finding and decision is not supported by the evidence.

(4) The Court erred in admitting certain incompetent, irrelevant and immaterial testimony on behalf of plaintiffs and over the objections of these defendants.

(5) For errors of law occurring at the trial and duly excepted to by these defendants at the time.

SHARTEL, KEATON & WELLS,
Attorneys for Above Named Defendants.

94 And thereafter, on the 16th day of *October*, 1903, the court overruled the said motion, and rendered the following judgment:

95 And thereafter and on the 17th day of August 1903, the court being fully advised in the premises overruled said motion and rendered judgment, which said judgment is in words and figures following to wit:

96 *Journal Entry.*

HEIRS OF H. C. SWEET
vs.
J. G. BOGARD ET AL.

On August 17, 1903, this cause came on to be heard. The plaintiffs appeared by their attorneys, Garrett & Garrett, and defendants, J. G. Bogard and others, who filed answer in this cause, appeared by their attorneys, J. R. Keaton, and all parties announced ready for trial, waived a jury and submitted this cause to the court without the intervention of a jury both as to matters of law as well as of fact. And the court having heard the evidence submitted and the argument of counsel, took the case under advisement for consideration and decision.

And thereafter, on the 21st day of August, 1903, the court having fully considered the case finds in favor of the plaintiffs, as prayed for in plaintiffs' petition. And it appearing to the court that the following named defendants have filed in this cause a disclaimer, each disclaiming any right, title or interest whatever in or to any part of the lots, blocks, lands, real estate and premises mentioned and described in plaintiffs petition by virtue of the deed and contract mentioned in said petition, namely:

George L. Allen, H. M. Ferguson, O. P. Elliott, F. B. Duke, G. H. Eubank, R. C. Hannah, G. W. Lynch, S. H. Tittle, W. L. Pendergraft, and M. E. Clar; It is therefore considered and adjudged by the court that all cloud occasioned by reason of the deed and contract mentioned in plaintiffs petition on the lands therein and hereafter described be, and the same is hereby removed, and the said deed and contract as to said defendants so disclaiming and the plaintiffs, J. L. Sweet, Leona S. Herd, Lucy S. Wilson, and F. H. Sweet, and the minors, Albert Orlando Sweet, Mira E. Sweet, Joseph L.
97 Sweet, Lucy Sweet, and Emory Sweet and their guardian A. W. Putnam, be and the same are hereby held for naught and that the said defendants so disclaiming go hence without day and recover of said plaintiffs their costs in this behalf expended.

It is further ordered, considered and adjudged by the court that the said Plaintiffs, J. L. Sweet, Leona S. Herd, Lucy S. Wilson and F. H. Sweet, and the minors, Albert Orlando Sweet, Mira E. Sweet, Joseph L. Sweet, Lucy Sweet and Emory Sweet joined by their guardian, A. W. Putnam, recover of the defendants J. G. Bogard, J. H. Simpson, H. Y. Hoover, L. J. Edwards, G. S. Huling, S. C. Van Leer, J. A. Powers, M. C. Logan, Addie V. Logan, James W. Logan, Belle Pendergraft, Myrtle E. Pendergraft, Claude D. Pendergraft, Conway Pendergraft, Lillie V. Pendergraft, Isom P. Pendergraft and William Pendergraft, being defendants who answered and recover of the defendants, E. R. Fletcher, E. A. Winkler, Alice Edwards, Margie Edwards, and Alcie Edwards, being defendants who failed to answer, the removal of all cloud upon plaintiffs petition, to the following described real estate, lands and premises, to wit:

All of the town lots in the City of Mangum, Greer County, Oklahoma, formerly Greer County, Texas, as appears upon the corrected plat of said town filed and recorded in the County Clerk's office of said Greer County, in deed record of said County in volume 2 page 35 to which record reference is here made for more complete description of this land, save and except the following lots as shown by said mentioned plat, which are not included in this decree to wit:

Lots Nos. 5, 8 and 3 in Block 2;
Lots Nos. 3 and 1 in block 25;
Lots 1, 2, 3, 5, 6, and 4 in block 13;
Lots, 1, 2, 3, 4, 5, and 6 in block 11;
Lots Nos. 6, 5, 3, 4, and 2 in block 19;
98 Lots. Nos. 5 and 7 in block No. 3;
Lots. Nos. 2, 6, 3, 4, and 5 in block No. 15;
Lots. 1, 2, 3, 4, 5, and 6 in block No. 10;
Lots. 1, 2, 3, 4, 5, and 6 in block No. 9;
Lots. No-. 1, 2, 3, 4, 5, and 6 in block No. 12;
Lots. 1, 2, and 5 in block No. 8;
Lots. No-. 6, 1, 5, and 4 in block No. 16;
Lots Nos. 6, 3, 2, 5 and 4 in block No. 18.
Lot. No. 1 in Block No. 39;
Lot No. 2 in Block No. 20;
Lots Nos. 2 and 3 in Block No. 33;
Lots. Nos. 1 and 2 in block No. 24;
Lot No. 1 in block No. 14;
Lot No. 1 in block No. 26;
Lots. Nos. 1, 2, 3, and 4 in block No. 28;
Lots. 3 and 4 in block No. 6;
Lot No. 1, in block No. 32;
Lot No. 1 in block 29;
Lots. No-. 1 and 2 in block No. 17;
Lots No-. 2, 3, and 4 in block No. 26;
Lot No. 1 in Block No. 15;

All of Block No. 1, also Lots No-. 2, 3, and 4 in Block No. 26 and lots No. 1 in Block 15.

And the deed and contract mentioned in plaintiff's petition are hereby cancelled and held for naught and that plaintiffs be and they are hereby vested with the title to said lots, lands and premises mentioned in said map and plat of the town of Mangum aforesaid, save and except the lots and blocks above describe as excepted and that the defendants be divested of all right and title thereto and the plaintiffs recover of the defendants, J. G. Bogard, J. H. Simpson,
H. Y. Hoover, L. J. Edwards, G. S. Huling, S. C. Van Leer,
99 J. A. Powers, M. C. Logan, Addie V. Logan, James L. Logan,
Claud D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Lillie V. Pendergraft, Ison P. Pendergraft, and William Pendergraft, all the costs in this cause incurred for which execution may issue.

On August 21, 1903, the defendants, J. G. Bogard, J. H. Simpson, H. Y. Hoover, L. J. Edwards, G. S. Huling, S. C. Van Leer, J. A. Powers, M. C. Logan, *pro se* and as next friend of Addie V. Logan and James W. Logan, minors, and Belle Pendergraft, *pro se* and as

next friend of Claud D. Pendergraft, Conway Pendergraft, Myrtle E. Pendergraft, Isom P. Pendergraft, and William Pendergraft, minors filed their motion for a new trial.

And now on this 16th day of October, 1903, the above motion for a new trial came on to be heard. The Court after hearing said motion and the argument of counsel for plaintiff and defendant overruled said motion, to which action of the court in overruling said motion the defendants then and there in open court excepted and still except and gave notice of appeal to the Supreme Court of this Territory.

October 16, 1903, it is ordered by the court that 15 days be allowed said defendants from this date to prepare and present a case-made and five days be allowed the plaintiffs to suggest amendments thereto and three days to settle the same.

JAMES K. BEAUCHAMP, *Judge.*

O. K.:
GARRETT & GARRETT,
Plaintiff's Att'ys..

100 TERRITORY OF OKLAHOMA, *Greer County:*

The foregoing contains a true and complete statement of all the pleadings, motions, orders, evidence, findings and proceedings upon which judgment was rendered and the judgment in said cause.

SHARTEL, KEATON & WELLS,
Att'ys for Defendants.

Filed Oct. 15, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

101 TERRITORY OF OKLAHOMA, *Greer County, ss:*

We, the undersigned attorneys for the plaintiff in the foregoing suit certify that the foregoing case made was duly served on us on the 31 day of October, 1903, and that the same is correct and that we have no amendments to suggest.

GARRETT & GARRETT,
Attorneys for Plaintiffs.

Filed Oct. 15, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

102 TERRITORY OF OKLAHOMA, *Greer County:*

We, the undersigned attorneys for the plaintiff in the foregoing suit, certify that the foregoing case was duly served on us this 19 day of Oct., 1903. GARRETT & GARRETT,
Attorneys for Plaintiffs.

Filed Oct. 15, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

The foregoing case is correct, we have no amendments to suggest.

GARRETT & GARRETT,
Attorneys for Plaintiffs.

Filed Oct. 15, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

103 TERRITORY OF OKLAHOMA, *Greer County:*

This is to certify that the foregoing above case made and the amendments thereto have been duly served in due time, and the amendments thereto duly suggested, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth and as corrected by me, is true and correct, and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings, and judgments had in such cause; and I hereby settle, allow, certify and sign the same as true and correct, and hereby order that the clerk of the District Court attest the same with the seal of said court and file the same as of record.

Witness my hand at Mangum this 20 day of February 1904.

JAMES K. BEAUCHAMP, *Judge.*

Attest:
[SEAL.] J. P. RENSHAW, *Clerk.*

Filed Oct. 15, 1904.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

Filed Feb'y 20, 1904.
J. P. RENSHAW, *Clerk.*

104 Case-made endorsed as follows: No. 1623. J. G. Bougard, *et al.* Plaintiffs in error, *vs.* F. H. Sweet, *et al.*, Defendants in Error. Petition in error and Case made. Filed February 20, 1904, J. P. Renshaw, Clerk. Filed Oct. 15, 1904, Benj. F. Hegler, Clerk Supreme Court, by Jessie Pardoe, Deputy.

105 And afterward, at the January, 1905, Term of said Supreme Court, on the seventh day of January, 1905, the following proceedings was had in said cause, to wit:

#1623.

J. G. BOUGARD, J. H. SIMPSON, ET AL., Plaintiffs in Error,
vs.
F. H. SWEET, J. L. SWEET, ET AL., Defendants in Error.

Comes now James R. Keaton, of counsel for plaintiffs in error, and makes oral argument herein. And cause is submitted on record, briefs and oral argument.

106 And afterward, at the June, 1905, Term of said Supreme Court, on the Fourteenth day of June, 1905, the following proceeding was had in said cause, to wit:

#1623.

J. G. BOGARD, J. H. SIMPSON, ET AL., Plaintiffs in Error,
vs.
F. H. SWEET, J. L. SWEET, ET AL., Defendants in Error.

And now the Court grants leave to both parties to file additional briefs herein.

107 And afterward, at the June Term, 1905, of said Supreme Court, on the Sixteenth day of June, 1905, the following proceeding was had in said cause, to wit:

#1623.

J. G. BOGARD, J. H. SIMPSON, ET AL., Plaintiffs in Error,
vs.
F. H. SWEET, J. L. SWEET, ET AL., Defendants in Error.

Ordered by the Court, that leave be given to file briefs herein as per stipulation of the parties.

108 And afterward, at the June, 1906, Term of said Supreme Court, on the Sixth day of September, 1906, the following proceeding was had in said cause, to wit:

#1623.

J. G. BOGARD ET AL., Plaintiffs in Error,
vs.
F. H. SWEET ET AL., Defendants in Error.

And now this cause comes on for final decision and determination by the Court upon the record, briefs and oral argument submitted therein.

And the Court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiffs in error.

It is therefore ordered and adjudged by the Court, that the judgment of the District Court of Greer County in this cause, be and the same is hereby affirmed, at the cost of plaintiffs in error.

Opinion by Pancoast, J., all the Justices concurring.

Which opinion reads in words and figures as follows, to wit:

109 In the Supreme Court of the Territory of Oklahoma, June Term, 1906.

Filed September 6, 1906.

No. 1623.

J. G. BOGARD ET AL., Plaintiffs in Error,
vs.
F. H. SWEET ET AL., Defendants in Error.

Syllabus.

1. Cancellation, Proper, When.—(Where S purchases from the State of Texas land in what is now Greer County, Oklahoma, and plats the same as a portion of the townsite of Mangum, and thereafter enters into a contract with certain persons for the establishment of a newspaper, wherein it is agreed that such persons shall form a corporation, and run said newspaper and sell S's townsite property, and collect certain notes held by him, paying two-thirds of all amounts received to said S, themselves retaining one-third; and where S, in pursuance of said contract, as a matter of convenience, executes and delivers to such persons a warranty deed to said land, and such corporation is never formed, but the project is abandoned, and the deed, together with the notes returned to S, *held*, that S in such case is entitled to a decree cancelling such contract, and the deed executed thereunder.)

Error from the District Court of Greer County.

James K. Beauchamp, Trial Judge.

Affirmed.

Shartel, Keaton & Wells and J. A. Powers, for plaintiffs in error.
Garrett & Garrett and Chas. M. Thacker, for defendants in error.

Statement of the Case.

This was an action commenced in the District Court of Greer County by H. C. Sweet and others, against J. G. Bogard *et al.*, for the cancellation of a deed to certain town lots in the city of Mangum, Greer County, and a certain contract made in connection therewith. A number of the defendants answered, disclaiming any interest in the property; and, the plaintiff having died, the action was revived in the name of the heirs. Judgment was rendered, cancelling the deed and contract as prayed for in the petition.

The record discloses that at a date when Greer County was claimed to be a part of and under the jurisdiction of the State of Texas, H.

C. Sweet purchased the land in controversy from that State; and while claiming the same under such title, platted it into town lots which became, and were at the time of the action, a part of the townsite of the city of Mangum. H. C. Sweet, desiring to aid in the upbuilding of a newspaper and the town generally, entered into a contract with the defendants in error, and others, to allow the plaintiffs in error to sell his townsite property, and to collect certain notes which he then had, for property by him theretofore sold, the understanding and agreement being that in order to facilitate the business, the plaintiffs in error were to form a corporation for the purpose of running the newspaper and selling the real estate, it being agreed that the corporation should sell the property and collect the notes, and pay to Sweet two-thirds of the amount of the sales, and retain one-third thereof as their commission.

As a matter of convenience, in the carrying out of the contract, a deed was made by Sweet and wife to all of the property. Afterwards an attempt was made to form the corporation. There being no law in Texas under which such a corporation could be formed, that portion of the scheme failed, and as shown by the record the project was dropped by almost all, if not entirely all of the parties connected therewith, and the deed, although recorded, was returned to Sweet, together with the notes.

Soon after, the decision was rendered by the Supreme Court of the United States, holding that Greer County did not belong to the State of Texas, but was a part of Oklahoma. Sweet, finding that his title from the State of Texas was of no validity, entered the land under act of Congress approved January 18, 1897. The deed made by Sweet and wife to the company, however, having been recorded, constituted a cloud upon his title, hence this action to remove the same.

110 *Opinion of the Court by Pancoast, J.*

The contention of the plaintiffs in error is that the contract is one of monetary consideration, that mentioned in the deed being ten dollars, and that the title after acquired by Sweet from the United States should inure to the benefit of the grantees, and that there is no such case for equity as will warrant the court in cancelling the deed and contract. Very elaborate briefs have been filed, and the case has been argued upon numerous different grounds, many of which we think have no application to the facts in the case, or to any rule that should govern the court in its decision. In fact, many of the questions argued have served only to confuse the court in arriving at the real contention in the case.

The evidence abundantly shows that Sweet's purpose in making the contract was to aid in the upbuilding and advertising of the town generally, and the printing of a newspaper. In order to do this, he placed this property in the hands of the parties, in order that they might sell the same and receive compensation therefor. By this contract, the parties became his agents, and he was entitled to a reconveyance of all of the unsold property. All the contentions of

Sweet were conceded by a large number of the persons interested. Some few, however, refused to reconvey, and set up claims to the property, but we cannot see upon what theory they can claim to be the owners of the property as against Sweet and his heirs.

There was a large number of lots transferred, and a large number of notes placed in the company's hands for collection. The consideration mentioned in the deed is ten dollars, a mere nominal sum. The amount they should receive as compensation was one third of the sales and from collections. As testified to by some of the witnesses, they soon found that the expense of collecting the notes would be more than their fees, and they simply abandoned any attempt to carry out the provisions of the contract on their part. (One of the parties testified he delivered the deed back to Sweet, all supposing that would be all sufficient.)

There is nothing in the case that requires the application of any rule of law, other than those which the above statement justifies. There is absolutely no defense to this action, and the judgment of the trial court was certainly the correct one.

Finding no error in the record, the judgment of the court below is affirmed. All the justices concurring.

111 In the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA,
Territory of Oklahoma, ss:

Certificate.

I, Benj. F. Hegler, Clerk of the Supreme Court of the Territory of Oklahoma, do hereby certify that the foregoing 110 pages, numbered from 1 to 110, inclusive, are a full, true and complete transcript of the record and all proceedings in said Supreme Court in the case of J. G. Bogard *et al.*, Plaintiffs in error, *vs.* F. H. Sweet *et al.*, Defendants in error, as the same remain upon the files and records of said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, at the City of Guthrie, this 8th day of November, 1906.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 20,461. Oklahoma Territory supreme court. Term No. 156. J. G. Bogard, J. H. Simpson, H. Y. Hoover *et al.*, appellants, *vs.* F. H. Sweet, J. L. Sweet, Leona S. Herd *et al.* Filed November 19th, 1906. File No. 20,461.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

J. G. BOGARD, *et al*,
Appellants,
vs.
F. H. SWEET, *et al*,
Appellees.

No. 156

BRIEF FOR APPELLANTS.

STATEMENT.

As a brief statement of the material facts disclosed by the record in the above entitled cause, we submit the following:

That on the 2nd day of August, 1900, H. C. Sweet, now deceased, commenced an action in the District Court of Greer County, Oklahoma, against appellants and others, to quiet his title to the following described tracts of land situated in said county, to-wit:

The southeast quarter of the southeast quarter of section twenty-seven (27), southwest quarter of the southwest quarter of section twenty-six (26), northeast quarter of the northeast quarter of section thirty-four (34), and the northwest quarter of the northwest quarter of section thirty-five (35), in township five (5) north of range twenty-two (22) west of the Indian Meridian; and

to cancel a warranty deed for the same tracts under a different description, conveying title to appellants and various other parties therein named as grantees, signed by said H. C. Sweet and his wife, Anna Sweet, on the 10th day of December, 1890, and acknowledged by them on the 10th day of February, 1891, and duly filed for record on June 24, 1891, at 4 o'clock p. m. in the office of the county clerk of Greer county, and recorded on the same date in Volume 2, pp. 308-9 of the deeds records of said county (R., pp. 9-16.)

The petition filed by the said H. C. Sweet contains two counts, the first alleging, among other things, that on the 13th day of October, 1898, he received a patent from the government of United States, conveying to him the tracts of land hereinbefore described, also, "That on or about the said —— day of December, 1890, this plaintiff prepared and, at some time not later than about the 10th day of February next thereafter made, executed and delivered to the aforesaid members of the aforesaid Mangum Star Printing and Publishing Association his certain deed and instrument in writing, a true copy of which is hereto attached and marked "Exhibit A," and hereby made a part of this petition," and that the land described in said deed, together with the excepted lots and parcels therein named, "is the same land as that described hereinabove as contained in the patent of the Government of the United States to this plaintiff, dated October 13, 1898." (R. p. 10.)

As "Exhibit B" to said petition, is also set out an instrument executed by the parties named as grantees in said deed, stating, among other things, "that whereas the said H. C. Sweet and wife on the 10th day of December, 1890, did execute and deliver their warranty deed to us for the town lots in said deed described, situated in the town of Mangum, Greer County, Texas, and accurately described in said deed, which deed is recorded in Volume 2, pp. 308-9 Deed Record of Greer County, Texas, * * * now, therefore, in consideration of said conveyance of said town lots by said H. C. Sweet and wife, Anna Sweet, and other valuable considerations to us paid, we hereby bind ourselves, the grantees in said

deed, our heirs and assigns and legal representatives to use reasonable diligence to sell said lots and collect payments therefor and to pay over to H. C. Sweet and wife, Anna Sweet, two-thirds of the gross receipts in cash received and collected on all sales of said lots as soon as collected."

The principal grounds alleged in the first count of plaintiff's petition as reasons for the cancellation of said deed are: first, the failure of the grantees to pay or perform the consideration agreed upon in the written contract (Exhibit B), and, second, that subsequent to the execution and recording of said deed there was an oral understanding between the grantor and the grantees therein to the effect "that the transaction of making and delivering said deed and said contract, as aforesaid, was and should be rescinded and vacated." (R. pp. 11-12.)

In this connection we call special attention to the fact that the petition contains no allegation to the effect that the execution of said deed was procured by any fraudulent representations made by any of the grantees therein named, or by any other deceit practiced by said grantees, or any one else. Nor does said petition contain any allegation charging that the deed was executed by reason of any mistake, oversight, or misapprehension on the part of the grantor. The deed itself recites a consideration of $10.00, the receipt of which is duly acknowledged by the grantors therein named. (R. p. 14.)

In the second count or cause of action the said H. C. Sweet, alleges, in substance, that, at the time of the execution of the warranty deed referred to and set out as a part of the first count, he had no title to the land described in said deed and that his after acquired title by patent from the United States under what is designated as the Additional Land or Purchase clause of an Act of Congress providing for the disposition of lands contained in Greer County, Oklahoma, formerly Greer County, Texas, did not inure to the benefit of his grantees in the previous deed, and that, for this additional reason, said deed should be decreed null and

void. (R. pp. 12-13.) To this count, or cause of action, a general demurrer was sustained by the trial court and, while counsel for the heirs of said H. C. Sweet excepted to this ruling, no cross errors were assigned to the Supreme Court of Oklahoma Territory, and said ruling was permitted to become final. (R. pp. 22-23.)

A number of the parties defendant in said action; other than appellants, filed disclaimers of "any right, title or interest whatever in or to any of the * * * lands * * * described in plaintiff's petition." (R. pp. 18-22). Thereafter, and on May 10, 1901, the suggestion of the death of H. C. Sweet, together with a motion that the action be revived in the names of J. L. Sweet, Leona S. Hurd, Lucy S. Wilson, F. H. Sweet, A. W. Putnam, guardian of the estates of Albert Orlando Sweet, Myra E. Sweet, Joseph L. Sweet, Lucy Sweet and Emery Sweet, minors and heirs of H. C. Sweet, deceased, was filed. (R. p. 23.) This application was granted on the same date.

Thereafter, and on the 3rd day of June, 1901, and after the demurrer of appellants had been overruled to the first count or cause of action contained in said petition, (R. p. 23) by leave of court appellants filed their answer in said cause, admitting the execution of the warranty deed set out as "Exhibit A" of plaintiff's petition and the written contract set out as "Exhibit B" thereof, and that the said H. C. Sweet received a patent for the tracts of land described in said petition on October 13, 1898, as therein alleged, denying each and every other allegation contained in the first count of said petition and specifically denying "that the deed from said H. C. Sweet and Anna Sweet so made and executed to them and other defendants named in said petition was without consideration, but, on the contrary," stating, "that same was executed for a good and valuable consideration;" and praying that judgment be rendered against plaintiffs, quieting and confirming the title to the tracts of land described in said petition in appellants and for all other just and equitable relief. (R. p. 24.)

Thereafter, and on the 17th and 18th days of August, 1903, said cause was tried to the court the undisputed evidence showing,

among other things, that the grantees in said deed tried in good faith to sell the lots thereby conveyed to them by advertising same for sale in a newspaper which they had purchased as a part of the real consideration for the execution of said deed, and that (at least) a portion of the sum of $10.00 stated therein as the consideration for the execution thereof, was paid to the grantors named therein. (R. pp. 26-55.) At the commencement of said trial and after the first question had been propounded to the first witness produced on behalf of appellees, counsel for appellants objected to the introduction of any testimony under the petition for the reason that it fails to state a cause of action (R. p. 26), and, at the conclusion of the testimony introduced on behalf of the appellees, said counsel interposed a demurrer to the evidence upon the ground that same fails to establish any cause of action against appellants, but, on the contrary, affirmatively shows that they are entitled to the relief prayed for in their answer. (R. p. 39.) At the conclusion of the trial, and after hearing all the evidence and the arguments of counsel thereon, the trial court found the issues in favor of appellees (R. p. 55), and, thereafter, and on the 21st day of August, 1903, appellants filed their motion for a new trial (R. p. 57), and, thereafter, and on the 16th day of October, 1903, said motion for a new trial was overruled by the trial court and final judgment rendered in favor of appellees cancelling said deed and quieting and confirming the title to the real property therein described, in appellees. (R. pp. 58-60.) From said judgment of the District Court of Greer County, Oklahoma, the cause was taken to the Supreme Court of the Territory of Oklahoma by petition in error, and case-made (R. pp. 7-8-60-61). Thereafter, and at the June Term, 1906, and on September 6, 1906, the Supreme Court of the Territory of Oklahoma handed down an opinion in said cause affirming the judgment of the trial court. (R. pp. 63-5.)

Such additional facts as are deemed material to the propositions urged as grounds for reversing the judgment of the court below are stated in the argument.

ASSIGNMENTS OF ERROR.

FIRST. The Supreme Court of Oklahoma Territory erred in holding and deciding that, by the terms of the deed and subsequent written contract, the grantees in the former were merely the agents of the grantor for the purpose of selling the real property therein described and without any beneficial interest in the property.

SECOND. The said court erred in holding and deciding that: "By this contract, the parties became his (grantor's) agents, and he was entitled to a re-conveyance of all the unsold property."

THIRD. The said court erred in holding and deciding in effect that the return of a warranty deed, duly executed and recorded, to the grantor by one of several grantees, upon the understanding between the grantor and such grantee that the grantees had failed to perform the things constituting the principal consideration for which the deed was executed, operated to revest the grantor with the equitable title to the land conveyed as against all the grantees.

FOURTH. The said court erred in holding and deciding that the grantor in a deed, executed without fraud, duress or mistake of fact, is entitled to a decree canceling same by merely showing a failure of consideration.

FIFTH. The said court erred in holding and deciding that the evidence in the case at bar shows a failure of the consideration for which said deed was executed as expressed therein and in the subsequent written contract.

SIXTH. The said court erred in not holding and deciding that the grantor in a deed is, in the absence of fraud, duress or mistake, estopped to deny the consideration expressed therein for the purpose of defeating the conveyance.

ARGUMENT.

I.

We will consider the first and second assignments of error together as each presents, in a different form, the fundamental error committed by the court below in holding that the warranty deed

and subsequent written contract did not vest any title to the land therein described in the grantees named in the former, but only constituted them agents of the grantor for the purpose of selling such land on commission. It would seem that a mere statement of this proposition suffices to show its fallacy. It is entirely clear that the grantees in said deed could have sold said land without regard to the wishes of said grantor as to the terms of sale, and conveyed as good a title as that previously possessed by him; whereas, "A real estate agent authorized to sell land has thereby no authority to execute a contract to sell." Carstens vs. McReavy, (Wash.) 25 Pac. 471.

> "A real estate broker, who has lands placed with him for sale, has no authority to receive money on the purchase price of such lands." Halsell vs. Renfrow, (Okla.) 78 Pac. 118.

See, also, to same effect, Keim vs. Lindley, (N. J.) 30 Atl. 1063.

How, then, can it be correctly held that no title to the land ever vested in these grantees? An examination of the authorities on questions of this character shows that the grantor, in every properly executed deed, parts with his title to the premises therein described but the question frequently arises as to whether or not the conditions expressed in a deed, or in a contemporaneous written contract, are such as to authorize the cancellation of the deed, at the election of the grantor, upon the failure of the grantee to perform said conditions. Rawson vs. Inhabitants of School District No. 5, 7 Allen (Mass.) 125; Horner vs. Chicago, Milwaukee & St. Paul Ry. Co. 38 Wis. 165, Bailey vs. County of Umatilla, (Or.) 13 Pac. 890.

It will be observed that the written contract (Exhibit B) contains no provision in any wise limiting the scope of the previous conveyance but, on the contrary, fully recognizes the fact that the title to the land described therein had been fully vested in the grantees therein named and recites that "in consideration of said conveyance, * * * and other valuable considerations" paid to said grantees, they bind themselves "to use reasonable diligence to

sell said lots," etc. This contract not only does not contain any condition subsequent upon the happening of which the previously executed deed might, at the election of the grantor, be deemed null and void, but does not even contain any words of limitation or restriction of the use which the grantees should make of the real property therein described except to require that they use reasonable diligence to sell same. The theory upon which the court below considered this contract as one creating the grantees named in said deed, mere agents of the grantor for the purpose of selling the various lots and parcels of land therein described, we are unable to determine, as it is not stated in the opinion handed down by said court.

A written instrument which not only empowers the parties therein named as grantees to convey a certain tract of land, "by good and sufficient deed," but also releases and quit-claims to them the title to such tract "is not a power of attorney, but vests the estate in the persons named." Burrow vs. Terre Haute & L. R. Co. (Ind.) 8 N. E. 167; See also, Rust vs. Goff (Mo.) 7 S. W. 418. Bortz vs. Bortz, 48 Pa. St. 382.

II.

There can be no question but that the third assignment of error is well taken and that the mere return, by one of the grantees of the previously duly executed and recorded deed to the grantor did not operate to revest him with the title to the real estate therein described, especially as against appellants, who never consented thereto, nor had any knowledge of the transaction.

Mr. R. C. Hanna, who returned said deed to the grantor upon his request, gives the following testimony on this point:

> "I had Mr. Sweet's deed in my possession until after the thing was dropped. He asked me for it and I gave it back to him after the thing had dropped out, just failed.. * * *
>
> Q. When Mr. Sweet asked you for the deed you did not consult any of the other members about it, just handed it to him?

A. Yes, sir. The thing had been disorganized for some time, the stock sold and I considered the transaction closed." (R. p. 33).

Mr. J. H. Simpson, one of the appellants, gives the following testimony on this point:

"Q. Did you authorize Mr. R. C. Hanna, or anybody else to make any recision of this contract and deed you had made with Mr. Sweet, or to return him the deed?

A. I did not.

Q. Did you at any time abandon or relinquish your interest in this real estate that had been conveyed to you?

A. No, sir." (R. p. 47.)

Mr. G. S. Huling, also, one of the appellants, gives the following testimony thereon:

"Q. As a member of that company did you ever, at any time, authorize Mr. Hanna to make recision of this contract and deed with Mr. Sweet or return him the deed?

A. No, sir." (R. p. 50).

However, the rule is well settled that "The return to the grantor or destruction of a deed to lands, will not revest the grantor with the title; the title to lands can be transferred only by deed." Jackson vs. Anderson, 4 Wend. (N. Y.) 474; See also, Jackson vs. Page, *Ibid*, 585; Marshall vs. Fisk, 6 Mass. 24; Botsford vs. Morehouse, 4 Conn., 550; Gilbert vs. Bulkley, 5 Conn., 262.

III.

In support of the fourth and sixth assignments of error, which we shall consider together, we most earnestly insist that the authorities on the question are well nigh, if not quite, uniform to the effect that the mere failure of the consideration named in a deed cannot be shown for the purpose of defeating the conveyance.

Jones on the Law of Real Property in Conveyancing, Secs 300-302;
3 Washburn on Real Property, 614.
6 Am. & Eng. Enc. L. (2nd ed.) 761;
McCalle vs. Bane, 45 Fed. 828;
Omar vs. Boyer, (Ala.) 7 So. 663;
Coles vs. Soulsby, 21 Cal. 47;
Hartman vs. Reed, 50 Cal. 485;

Lawrence vs. Gayetty (Cal.) 20 Pac. 382;
Feeney vs. Howard, (Cal.) 21 Pac. 984;
Downing vs. Rademacher, (Cal.) 62 Pac. 1055;
Beldon vs. Seymour, 8 Conn. 304;
Bever vs. North, (Ind.) 8 N. E. 576 (578);
Adams vs. Watkins, (Mich.) 61 N. W. 774;
Bobb vs. Bobb (Mo.) 4 S. W. 512;
McRae vs. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103;
Morse vs. Shattuck, 4 N. H. 229;
Sturtevant vs. Sturtevant, 20 N. Y. 39;
Vail vs. McMillain, 17 O. St. 617 (623);
Finlayson vs. Finlayson (Or.) 21 Pac. 57;
Hannan vs. Oxley, 23 Wis. 519.

In McRae vs. Purmort *supra*, it is held that:

> "Parol evidence is admissable to explain the consideration clause in a deed in all cases except for the purpose of showing that the deed was without consideration and thereby defeating or avoiding it."

In Omar vs. Boyer, *supra*, it is held that:

> "The recital of a valuable consideration in a deed although nominal estops the grantor and those claiming under him from alleging that it was executed without any consideration."

In Bobb vs. Bobb, *supra*, it is held that:

> "A want of consideration cannot be shown, against the recital in a deed, for the purpose of defeating the operative words of the deed, as for the purpose of showing a resulting trust in the grantor."

In Morse vs. Shattuck, and Bever vs. North, *supra*, the following rule is laid down:

> "It is perfectly well settled that the consideration expressed in a deed cannot be disproved for the purpose of defeating a conveyance, unless it be on the ground of fraud."

In Feeney vs. Howard, *supra*, it is held that:

> "A grantor conveying land by deed, reciting a valuable consideration, in the absence of actual or constructive fraud, accident or mistake, cannot show by parol that no consideration passed, and that the conveyance was made in trust, the grantee agreeing to re-convey upon request."

In Lawrence vs. Gayetty, *supra*, it is held that:

> "Where a deed conveying an undivided interest in land is executed in consideration of the grantees' oral promises to make certain improvements on the land, and do certain other acts in the future, and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantees does not constitute a failure of consideration so as to entitle the grantor to rescind under Civil Code Cal. Section 1689."

In the opinion delivered in said case, the Supreme Court of California say, on this question, that:

> "Counsel for respondent rely upon section 1689 of the Civil Code. In our judgment the section referred to has no application to a case like this, where the vendor has waived actual performance on the part of the vendee, by relying upon his mere promise to perform, and, relying upon such promise to perform in the future, has executed the conveyance, thereby vesting the title to the property in his grantee. The contract on the part of the vendor is wholly executed * * *
>
> Leaving out of sight the question of fraud, which, as we have seen, was found against the respondent by the court below, the case cited and the one before us are identical in principle. Such a rule may work hardship in individual cases, and this may be one of those cases, but to hold that a vendee of real estate could, for a failure to pay the purchase money, repudiate his deed, and recover the land, would render real estate titles dangerously uncertain, and result in the most serious consequences."

It will be observed that the grantee in the deed under consideration in the case last quoted from was to do certain work in connection with the land, to-wit; make certain improvements thereon for the undivided one-half interest therein conveyed to him by the deed, which he failed to perform. In the case at bar, the grantees in the deed in question, even considering the subsequent contract as an integral part thereof, only agreed to use reasonable diligence to perform certain things in connection with the lands therein described.

We, also, regard the case of Downing vs. Radmacher, *supra*, (62 Pac. 1055) as being squarely in point upon the question under

consideration in the case at bar and as fully sustaining our contention on behalf of appellants. It is there held, among other things, that:

> "Where an undivided interest in a mining claim is conveyed in consideration of grantee's agreement to work the mine and deliver one-third of the minerals to defendant, and do certain other acts in the future, their performance not being made a condition subsequent, a mere failure to perform on the part of grantee does not constitute a failure of consideration, so as to warrant the cancellation of the deed."

In the body of the opinion handed down in said case the Supreme Court of California further say, in part:

> "Doubtless Rademacher expected that Downing would go forward and operate the mine for their mutual benefit, and no doubt his expectation in this regard formed part of the consideration, and the chief consideration in his mind for making the deed. Nevertheless, he exacted no promise, and none was made, that the deed should be inoperative if Downing failed to perform. In the matter of working the mine Rademacher trusted Downing, and he did not convey, or contract to convey to Downing upon condition that Downing would perform. Neither did he impose any condition in the deed or in the contract tending to show that a compliance on Downing's part was regarded as a condition subsequent, or that Downing's failure to perform should affect the title conveyed to Downing. * * * In the present case, Rademacher is asking the court to cancel the deed, or, if that cannot be done, then to require Downing to perform as a condition on which his title will be quieted. Clearly we cannot cancel the deed, there being no fraud in procuring its execution. * * * Shorn of this question of fraud, the case presents at most a failure of consideration; and upon principle, it is immaterial that the consideration took the shape of an agreement to work the mine and pay Rademacher a share of the proceeds rather than an agreement to pay a given sum of money, for which Downing had given his promissory note. But, had the consideration been a promise to pay money, no one would contend that simply upon a failure by the vendee to pay the purchase money, the vendor could have his deed cancelled."

The argument just quoted can, with equal force, be applied to the question under consideration in the case at bar, wherein

the promise of the grantees, as contained in a written contract, even conceding the claim that it was executed contemporaneously with the deed and as a part of the same transaction, is to perform certain acts in connection with the property conveyed, or rather to use reasonable diligence to perform these acts, to-wit: procure purchasers for, sell and convey the lots described in the deed and account to the grantor for a portion of the proceeds thus derived.

In the recent case of Calkins vs. Calkins, (Ill.) 77 N. E. 103, the rule for which we are contending is stated in the following language, to-wit:

> "In the absence of fraud, failure to pay the consideration expressed in the deed, is not cause for avoiding or cancelling it."

In Brand vs. Power, (Ga.) 36 S. E. 53, the rule is laid down as follows:

> "An absolute deed of conveyance will not, at the instance of the grantor, be cancelled merely because of a breach by the grantee of the promise made by him in consideration of which the deed was executed."

In Brown vs. Brown, (S. C.) 22 S. E. 412, it is held that:

> "A grantor cannot impeach his deed on the sole ground that it was without consideration."

It will be observed that all the testimony introduced on behalf of plaintiffs in the trial court, in the attempt to show a different consideration from that expressed in the deed and that same subsequently failed, went in over the objections of counsel for defendants in said court, and to the rulings of the court, admitting same, proper exceptions were saved (R. pp. 26-38), and that, upon the conclusion of the evidence on behalf of said plaintiffs, defendants interposed a demurrer thereto which was overruled and exception duly taken. (R. p. 39.)

We submit that these rulings of the trial court are clearly erroneous, and that the court below erred in not so holding. See Finlayson vs. Finlayson, *supra*, (21 Pac. 57), wherein it is held that:

> "A deed to real property cannot be invalidated by parol evidence showing that there was no consideration for its execution, when it contains a recital that a consideration has been received by the grantor; nor can it be shown by such evidence that the object or purpose of the deed duly delivered to the grantee was different from that implied by its terms,—unless executed to secure the payment of a debt, or the performance of some other act."

See, also, Bever vs. North, *supra*, (8 N. E. 576).

IV.

In support of the fifth assignment of error, we merely call special attention to the fact that the undisputed evidence in the case at bar shows the payment, in part at least, of the consideration expressed in the deed itself, and the performance of the provision of the subsequent written contract, which is claimed to constitute an additional consideration for the execution of said deed. Bearing in mind that this provision of the contract only requires that the grantees in said deed shall "use reasonable diligence to sell said lots and collect payments therefor," etc. (R. p. 16.) we submit that the evidence given by the witnesses introduced by the plaintiffs in the trial court makes a clear case of performance. For instance, Mr. Hannah, who claims to have returned the deed to the grantor, considering the undertaking for which it was executed had been abandoned, says, in answer to a question as to what the grantees did under the contract: "We tried to do something, but never did" (R. p. 32), and further testifies that "We advertised them (the lots described in said deed) in the papers in the usual way." (R. p. 33.)

Mr. S. H. Tittle, another witness for plaintiffs, testifies that, "The lots were advertised through the papers and they tried to collect something on the notes but failed." (R. p. 35.) Mr. H. M. Ferguson, another such witness, testifies as follows:

> "Q. State what was done, if anything, under that contract?
>
> A. Nothing to my knowledge. Something concerning

titles to land and records were not allowed to be made. * * *

Q. You advertised this property for sale?

A. Yes, sir.

Q. This notice came from the State officers?

A. It came from the State officers to County officers. * * *

Q. You did advertise this property for sale?

A. Yes, sir. I think a short time after we bought the stock." (R. pp. 36-37.)

To the effect that a portion, at least, of the sum of ten dollars expressed in the deed as the consideration therefor, was actually paid, see the testimony given on behalf of defendants in the trial court by Messrs. Edwards, Simpson and Huling (which said testimony is nowhere contradicted) on pages 40, 41, 46 and 51.

These witnesses further testify, and this testimony is also practically undisputed, that the inducement for their purchasing interests in "The Mangum Star," a newspaper plant then located in the town of Mangum, but whose owner was proposing either to sell same or move it from said town, was the proposition of the grantor in said deed to convey the real estate therein described to the grantees, under the conditions stated in said subsequent written contract. (R. pp. 41, 42, 46, 47 and 50.) It is not pretended that the grantor in said deed, or his heirs who were after his death substituted as plaintiffs in the trial court, ever tendered back any of the consideration received, or made any offer of any kind to place the grantees in *statu quo*.

All the foregoing propositions were urged to the court below and are practically disposed of by the following concise (if not very convincing) statements contained in the opinion handed down, to-wit:

> "Very elaborate briefs have been filed, and the case has been argued upon numerous different grounds, many of which we think have no application to the facts in the case, or to any rule that should govern the court in a decision. In fact, many of the questions argued have served only to confuse the court in arriving at the real contention in the case." (R. p. 64.)

This method of disposing of the contentions of parties is doubtless a rather convenient one for appellate courts, though certainly more or less unsatisfactory to the parties making the contentions.

The Supreme Court of the Territory of Oklahoma further says, in its opinion, that:

> "The evidence abundantly shows that Sweet's purpose in making the contract was to aid in the upbuilding and advertising of the town generally and the printing of a newspaper." (R. p. 64.)

We can safely concede this, since the evidence also abundantly shows that the grantees in the deed executed by Sweet and wife did these very things. They purchased the plant, printed the paper and advertised the town generally, in addition to advertising for sale the particular lots conveyed to them. (R. pp. 40, 41, 42, 45, 47, 50.) The performance of what the grantor contracted for as the consideration for this conveyance is hardly sufficient reason for setting same aside and revesting him with title to the lands conveyed.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the court below should be reversed and the cause remanded with directions to the Oklahoma Supreme Court to render judgment quieting and confirming title to the lands in question, in appellants.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
For Appellants.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 156.

J. G. BOGARD ET AL., APPELLANTS,

vs.

F. H. SWEET ET AL.

REPLY BRIEF FOR APPELLANTS.

JOHN W. SHARTEL,
JAMES R. KEATON,
FRANK WELLS,
Attorneys for Appellants.

(20,461.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 156.

J. G. BOGARD ET AL., APPELLANTS,

vs.

F. H. SWEET ET AL., APPELLEES.

REPLY BRIEF FOR APPELLANTS.

Counsel for appellees has filed herein two briefs, called the main and supplemental briefs, the last making several corrections of statements and citations contained in the first, and both, especially the first, containing some statements of fact not shown by the record, to some of which misstatements special attention will hereinafter be called. While conceding most of the positions taken by us in our original brief for appellants, said counsel still endeavors to support the decision of the court below upon several grounds, which may be summarized as follows:

First. Upon the theory that the deed was so defectively executed as not to vest title in the grantees therein named.

Second. Upon the theory that, being thus defectively executed, the alleged failure of the grantees to perform the actual consideration for which same was executed, coupled with the return of the deed to the grantor by one of the grantees, revested the title in the former.

Third. Upon the theory that, considering the deed and subsequent written contract together, it is shown that the grantees were merely agents of the grantor to sell the real property described in such deed, and, upon their failure to sell, the title thereto revested in the grantor, this being the theory first advanced by the Oklahoma Supreme Court and the ground upon which its opinion is based.

Fourth. Upon the theory that the subsequent written contract between the grantees and grantor in said deed, together with the verbal understanding between them, creates a resulting trust in favor of the latter. While this theory was neither pleaded by appellees nor urged by their counsel in either of the lower courts, it appears to be the principal one insisted upon in this court.

We shall consider the foregoing propositions in the order stated.

I.

The first contention is effectively answered by the following allegations contained in the petition, to wit:

> "That on or about the said — day of December, 1890, this plaintiff prepared, and, at some time not later than about the 10th day of February next thereafter, made, executed, and delivered to the aforesaid members of the aforesaid Mangum Star Printing and Publishing Association his certain deed and instrument in writing, a true copy of which is hereto attached and marked 'Exhibit A' and hereby made a part of this petition. * * *
>
> "That the said deed of this plaintiff was made by him to the said parties named without any consideration whatever being paid by the said parties to this plaintiff, and was made solely for the purpose of inducing, causing, and empowering said parties to sell and convey said land in accordance with a certain contract in writing made, executed,

and delivered by said parties and one E. R. Claunch to this plaintiff at the same time that he made, executed, and delivered to them the aforesaid deed," etc.
* * *

"That after the execution of said deed it was, on the 24th day of June, 1891, filed in the office of the county clerk of Greer county, Texas, which then had jurisdiction over said Territory of Greer county, Oklahoma, and exercised official authority therein, and said office of county clerk was then the proper office in which to file said instrument to give record notice to the world of its existence" (R., 10, 11, and 12).

In the face of these affirmative allegations to the effect that said deed was fully and properly executed, delivered, and recorded, we hardly think appellees can now be heard to say that, by reason of fatal defects in the execution thereof, title to the real estate therein described never passed to the grantees. The most serious defect claimed, however, is that the acknowledgment to this deed is invalid because taken before one of the grantees. This position is untenable for three reasons:

(1) This point is not only not raised by any allegation of the petition, but specifically denied by several allegations contained therein.

(2) There is nothing in the record to show that the J. W. Logan who took the acknowledgment is the same J. W. Logan named as a grantee in the deed.

(3) Under both the Oklahoma and Texas statutes, a deed otherwise legally executed is valid between the parties thereto without being acknowledged.

Heintz *vs.* O'Donnell (Tex.), 42 S. W., 797.

Sec. 888, Okla. Rev. Stat., p. 326.

II.

While we regard the second contention of counsel for appellees as sufficiently answered in our original brief (pp. 8-9), especially in view of the fact that both the pleadings and the evidence show a properly executed and fully delivered deed, we call special attention to the following cases in addition to those cited in said original brief:

> "The destruction or cancellation of a deed after it has been delivered does not revest the title in the grantor, even if destroyed or canceled with the consent of all the parties for the express purpose of restoring the title to the grantor. The title cannot be restored otherwise than by a reconveyance in writing" (Cramner *vs.* Porter, 41 Cal., 462).
>
> See also Lawton *vs.* Gordon, 34 Cal., 36.
> Wilson *vs.* Hill, 13 N. J. Eq., 143.
> Souverbye *vs.* Arden, 1 Johns. Ch. (N. Y.), 240.
> Hollingsworth *vs.* Walker (Ala.), 13 So., 6.

There is no principle enunciated by any of the authorities cited by counsel for appellees applicable to the question under consideration or in conflict with the rule laid down in the foregoing cases, as the former refer to the return of unrecorded deeds upon oral agreements of rescission supported by valuable considerations. (See appellees' Main Brief, pp. 13-15.) In this connection we desire again to call special attention to the fact that the record in the case at bar contains nothing whatever tending to show that any of the appellants consented to the return of the deed to the grantor, or even had any knowledge of this fact, but, on the contrary, it is specifically shown that they did not authorize any one to return said deed, or to attempt to make any rescission of the contract and deed.

III.

Inasmuch as the agency and resulting trust theories are closely related, and as we feel that the former is fully answered in our original brief, pages 6-8, we shall here consider them together, or, rather, consider the agency theory as incidental or subsidiary to that of the resulting trust theory, conceding that they are not inconsistent with each other. In fact, however, the former is based on the assumption that complete title never vested in the grantees, whereas the latter recognizes the vesting of title therein, but only as trustees for the grantor.

As showing the correct classification of the various kinds of trusts, and as further showing that the grantees in the deed in question cannot be held to have received title to the property therein described as trustees for the grantor, we call special attention to the case of Gabert *vs.* Olcott (Tex.), 23 S. W., 985. The facts upon which the claim of a resulting trust was rested in that case are much stronger than those in the case at bar; but the Supreme Court of that State denied the application of such doctrine to the state of facts there disclosed, using, in part, the following language:

> "The first question arises upon the effect of the deed from the railroad company to Bishop Dubois. That conveyance purports to be in consideration of the sum of five dollars and grants the property to C. M. Dubois, Bishop of Galveston, and his successors in office, for the use of the Roman Catholic Church. The habendum clause is as follows: 'To have and to hold, all and singular, the premises above mentioned, unto the said C. M. Dubois, Bishop of Galveston, for the use aforesaid, and to his successors and assigns forever.' We are of the opinion that the grantee took under the deed a fee-simple title in trust for the benefit of the church, whose officer he was. There are no conditions subsequent expressed, and, although they may be implied, they are not favored in law.

> It may be that the consideration expressed should be deemed nominal, and that the conveyance should be treated as voluntary, and it is true that a condition will be more readily implied in a deed of that character than in one which rests upon a valuable consideration. Yet the rule is well recognized that the mere declaration of the uses to which the granted premises are to be applied do not ordinarily import a condition. * * * In the deed before us, the use of the word 'assigns' in the habendum indicates that it was contemplated that the trustee should have power to sell the lots, and thus to divert them to a purpose other than that primarily intended." (See also, specifically, Farnham *vs.* Thompson (Minn.), 26 N. W., 9, and cases therein cited.)

It is thus seen that a failure of the purpose for which real property may be conveyed does not create a resulting trust in favor of the grantor unless the deed of conveyance, or some other written instrument relating to the same transaction, contains an express provision to that effect. The deed in question in the case at bar is absolute in its terms, and the subsequent written contract contains no provision which can possibly be construed as creating a condition subsequent, but, on the contrary, fully recognizes the fact that the complete title had been vested in the grantees by the terms of the deed. The entire provisions of this contract, so far as they relate to the conveyance of the real estate described in the deed, are in the following language:

> "Know all men by these presents that whereas on the 10th day of December, 1890, H. C. Sweet and his wife, Anna Sweet, did execute and deliver their warranty deed to us for the town lots in said deed described, situated in the town of Mangum, Greer county, Texas, and accurately described in said deed, which deed is recorded in vol. 2, pp. 308-9, Deed Record of Greer County, Texas, and to which reference is hereby made for a more complete description of said town lots: Now, therefore, in consideration of said conveyance of said town lots by said H. C. Sweet

> and wife, Anna Sweet, and other valuable considerations to us paid, we hereby bind ourselves, the grantees in said deed, our heirs and assigns and legal representatives, to use reasonable diligence to sell said lots and to collect payments therefor and to pay over to H. C. Sweet and wife, Anna Sweet, two-thirds ($\frac{2}{3}$) of the gross receipts in cash received and collected on all sales of said lots as soon as collected."

That "a parol agreement by a grantee to reconvey real estate to his grantor is within the statute of frauds and does not create an express trust in such real estate in favor of the grantor" is ruled in the following cases:

Thomas *vs.* Thomas (Neb.), 67 N. W., 182; Dailey *vs.* Kinsler (Neb.), 47 N. W., 1045; Walker *vs.* Locke, 59 Mass. (5 Cush.), 90; Turner *vs.* Ogden, 66 U. S., 450; 17 L. Ed., 203; Stephenson *vs.* Crapnell (Ill.), 28 N. E., 379; Hasshagen *vs.* Hasshagen (Cal.), 22 Pac., 294; Burt *vs.* Wilson, 28 Cal., 632; Jones *vs.* Van Doren, 18 Fed., 619; Gee *vs.* Thrailkill, 45 Kan., 173.

In Turner *vs.* Ogden, *supra,* it is held that—

> "Agreement by parol that a title should be released cannot be made a substitute for a deed of release or surrender executed and recorded."

In Stephenson *vs.* Crapnell, *supra,* in addition to holding that a resulting trust cannot be created by parol, it is declared that—

> "Where there is an express trust, there cannot be a resulting or implied trust."

In Burt *vs.* Wilson, *supra,* it is further held that—

> "If the language of a deed is the language intended to be used by the grantor, his mistake as to the legal effect of the language used will not afford him any ground for relief in equity."

In Jones *vs.* Van Doren, *supra,* is found the following language:

> "The legal title confessedly passed by the quit-claim deed. * * * There is nothing in the deed from the mother to her son expressing any design or intention to grant anything different from what was conveyed, and this bill cannot be sustained, in my opinion, without overturning a rule of law and evidence established for the security of all property."

However, as shown in our original brief, there is no testimony in the case at bar even remotely tending to show any verbal agreement that title should revest in the grantor upon a failure of the grantees to perform the conditions of the written agreement. In fact, the entire theory upon which the case was tried and decided in the district court, on the part of the appellees, was that of a failure of the real consideration for which the deed was executed. The Supreme Court of Oklahoma affirmed the judgment of the trial court on the theory that the grantees in said deed were the mere agents of the grantor to sell the real estate therein described. Counsel for appellees now asks this court to affirm the decree of the Oklahoma Supreme Court on the theory that the provisions of the subsequent written contract, together with certain oral agreements between the grantor and grantees, created a resulting trust in favor of the former.

We may safely concede that the provisions of this written contract are sufficient to create an express trust; but it is not one falling within the class known as "resulting trust," where, upon the happening of certain contingencies, the title is to revest in the grantor.

In Beavers *vs.* McKinley (Kan.), 32 Pac., 363, it is held that—

> "B. conveyed 160 acres of land, which had been taken under the homestead law, to his minor son, at a time when he was not in debt, by a warranty deed,

in the usual form, with an habendum clause, for the expressed consideration of $1,000; and the son afterwards reconveyed the same land to his father, taking from the latter a note for $1,500, and the father afterwards mortgaged the land for a like sum to go into business. *Held,* that the conveyance from the father to the son was not in trust for the benefit of the former, and that the reconveyance from the son to the father was not made in pursuance of any trust. No implied trust can result in favor of the grantor in a deed from a father to a son, where such deed expresses a valuable consideration, and contains an habendum clause and the usual covenant of warranty."

In Ladd *vs.* Johnson (Or.), 49 Pac., 756, it is held that—

> "A declaration of trust executed by a solvent person contemporaneously with an absolute deed recited that whereas the maker was in a state of mortal illness, and desired to provide for the payment of his debts, he had conveyed his real estate to plaintiff in trust to pay his debts, with the desire to avoid proceedings in the courts; it being declared that the deed was a conveyance in trust, with full power to sell, the balance, after payment of debts, to be returned to the maker, his heirs, executors or assigns. *Held,* that the deed and agreement did not constitute a mortgage, but passed the absolute legal title to the land."

A part of the opinion of the court on this proposition reads as follows:

> "A mortgage or deed of trust in the nature of a mortgage is intended as security for the payment of money, or for the performance of some collateral act, and becomes void upon such payment, or performance, * * * while a deed of trust of the character under consideration here is an absolute and indefeasible conveyance of the whole of the grantor's title for the purpose expressed. The former, whatever the form of the instrument, or whatever name may be given it by the parties, creates a mere lien, while the latter conveys title. It is manifest from

> this distinction that the conveyance in controversy in this suit is not a mortgage or deed of trust in the nature of a mortgage, but an absolute conveyance of the legal title of the property in controversy to the plaintiff. It was not made as security for Johnson's debts, or for the performance of any other act by him. The intention of the parties, apparent upon the face of the instruments, was to vest the title absolutely in the grantee for the purposes of the trust. It was never contemplated that anything more than the surplus remaining after the payment of Johnson's debts should be returned to him. The deed is in the usual form, and, standing alone, certainly operates to convey title; and there is nothing in the declaration of trust to show the contrary. There is no statement that it was intended as a security for Johnson's debts, nor is there anything from which such an intention can be inferred. There is no contingency upon the happening of which the instrument shall be void or inoperative. There is no right of redemption remaining in Johnson" (p. 757).

We regard the reasoning of the court in the case last cited as conclusive against the contention of opposing counsel on the question under consideration, and it is not in conflict with the principles enunciated by most of the authorities cited by him. For instance, in the case of Flagg *vs.* Walker, 113 U. S., 659, we find the following declarations:

> "It must be conceded that, in accepting the conveyance of the property, Walker became a trustee to manage the property and pay off the debts of Flagg, according to the terms of the trust, and should be held liable for the faithful discharge of his trust. * * * In view of the declaration of trust made by Walker on April 12, 1875, it is clear that the transaction between Flagg and Walker was not a mortgage. A mortgage is a deed whereby one grants to another lands, upon condition that if the mortgagor shall pay a certain sum of money, or do some other act therein specified, at a day certain, the grant shall be void. * * * Walker was to reimburse

himself out of the property conveyed to him by Flagg, and the parties never contemplated a reconveyance by Walker to Flagg of the property in question. * * * It is the case of a trust. * * * The property was conveyed to Walker to dispose of at pleasure and according to his best judgment, and he was in all things to be the sole judge of the time and manner of using and disposing of said property. * * * There is no charge in the bill that he has abused that discretion or that neglect to sell at the present time would result in loss to the appellants."

In Wood *vs.* Perkins, 57 Fed., 258, also cited by counsel for appellees (Main Brief, p. 13), the action was brought to enforce a trust and not to rescind or set aside the conveyance. It is there said, among other things, that—

"The deed or deeds conveyed to the respondent, absolutely, whatever interest the grantors possessed. They were made on the strength of the written executory contract, which will be referred to again, and the parol agreement and understanding set out in the bill. * * * The instrument of conveyance was absolute on its face, while the duty imposed upon the respondent was partly by parol and partly by a separate written contract. All this created a strict trust such as the common law anciently took no notice of and such as included a *cestui que trust*, whose only remedy was by subpœna issued out of chancery. * * *

"The result is that the respondent, being strictly a trustee, in accordance with the arrangement which has been described, instead of performing his trust, violated it, and has received, in lieu of what he should have received under his trust, a sum of money as the proceeds of his tortious breach of duty. Upon fundamental principles of law, the grantors were entitled to proceed by bill against him, as an equitable tort-feasor, and claim the value of the interest which he unlawfully disposed of, or, at their option, to waive the tort and claim the proceeds, as they have done in the pending suit."

The case of Sanford *vs.* Sanford, 139 U. S., 642, has no application whatever to the question under consideration, merely holding that—

> "If one takes a title in his own name, whilst acting as agent, trustee or guardian, or in any other fiduciary capacity, a court of equity will, upon the showing of the fact in an appropriate proceeding, subject the land to proper trusts in his hands or compel him to transfer the title to the party equitably entitled to it."

Section 2437 of Wigmore on Evidence, cited on page 20 of appellee's main brief, declares the following rule, which we have no disposition to dispute, to wit:

> "When a document of transfer of property is absolute in its terms, may an extrinsic contemporary agreement to hold the property as security only be established? This question has generally been answered in the affirmative."

It is also suggested, rather than contended, on said page 20, Main Brief, that under article 272, title 12, Revised Statutes of Texas, 1879 (Art. 314, title 13, Sayle's Statutes of 1897), that a failure or partial failure of consideration may be shown to defeat the operation of a deed; but it is entirely clear that this section has no application to such an instrument, but only applies to bills, notes, and other similar written instruments, whereas the law applicable to conveyances is contained in title 19, Revised Statutes of 1879 (title 20, Sayle's Statutes of 1897). See also on this question Lawrence *vs.* Gayetty (Cal.), 20 Pac., 383.

IV.

In various portions of the two briefs filed by counsel for appellees some rather indefinite points are sought to be made against the validity of the deed in question on the grounds that the grantor had no title at the time of the

execution of same; that his after-acquired title was procured by patent from the United States, etc. It is a sufficient answer to all these to say that they are alleged in the second count or cause of action contained in the petition of appellees, to which a demurrer was sustained and no cross-errors assigned on said ruling (R., 12-13 and 23); hence none of these matters is before this court.

Aside from this, the title acquired by the grantor by patent from the United States was by purchase under the act of January 18, 1897, providing that "every such person (homesteader) shall also have the right, after six months, prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred ninety-six, not exceeding one hundred sixty acres, which, prior to said date, shall have been cultivated, purchased or improved by him" (29 Stat., 490), and involves none of the questions applicable to an attempted alienation of a homestead prior to the issuance of patent therefor, and there is absolutely no reason why, in the case at bar, the after-acquired title of the grantor should not inure to the benefit of the grantees, as it is only because it is the declared "theory and policy of the homestead law that the homestead shall be for the exclusive benefit of the homesteader;" and, because "the homestead right cannot be perfected in case of alienation or contract for alienation without perjury by him," that it is held to be against public policy to permit a homesteader to alienate prior to the issuance of patent (Anderson *vs.* Carkins, 135 U. S., 483; 34 L. Ed., 272).

Except in cases involving the right to alienate homesteads, the law is well settled that—

> "Where one makes a deed to land covenanting therein that he is the owner and he subsequently acquires a new title, his new title inures to the benefit of his grantees" (Irvine *vs.* Irvine, 76 U. S., 617; 19 L. Ed., 800).

In the opinion of the court in the case last cited is found the following language:

> "But it is argued on behalf of plaintiff that the deed was inoperative, because it was forbidden by the twelfth section of the act of Congress of September 4, 1841, which granted pre-emption rights and enacted that any grant or conveyance made before the entry of the land shall be null and void, except in the hands of *bona fide* purchasers for a valuable consideration. To this it may be answered that neither that act nor the acts of May 29, 1830, and January 23, 1832, have any application to the present case. They relate to pre-emptive rights conferred upon actual settlers. The plaintiff did not enter the land in dispute under either of these, and no act of Congress deprived him of the power to sell and convey after he had made an entry and paid all the purchase-money, though before he had received his patent."

See also Moore *vs.* Crawford, 130 U. S., 122; 32 L. Ed., 878.

Van Rensselaer *vs.* Kearney, 11 Howard, 297; 13 L. Ed., 703.

Oklahoma Rev. St., Sec. 895, p. 327.

For the reasons hereinbefore stated, we respectfully submit that the judgment of the court below should be reversed, with directions to enter a decree in favor of appellants.

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Attorneys for Appellants.

Office Supreme Court U. S.
FILED.
JAN 27 1908
JAMES H. McKENNEY
Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

J. G. BOGARD, et al,
Appellants,

vs.

F. H. SWEET, et al,
Appellees.

No. 156

BRIEF FOR APPELLEES

CHAS. M. THACKER,
For Appellees.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

J. G. BOGARD, et al,
Appellants,

vs.

F. H. SWEET, et al,
Appellees.

No. 156

BRIEF FOR APPELLEES

STATEMENT.

"A concise statement, or abstract of the case, presenting succinctly the questions involved and the manner in which they are raised," is here a delicate and difficult undertaking, especially to one whose knowledge of the facts, as they should have been developed upon the trial of the case, is as full as my own, in view of the imperfect record, in which so much that should have been proven and made definite and certain is left to inference and conjecture, as the same, in respect to the facts, was actually made in the trial court, to say nothing of such other unsatisfactory features as minor errors or defects in the petition to the trial court and the apparent probability of a few minor and, I think, harmless

errors that have innocently crept into the record since the trial in the district court; but, being unable to fully concur in the conceptions of counsel for appellants in this regard and deeming a more extended statement of the allegations in said petition and of the facts proven essential to a correct understanding of the questions involved, I respectfully submit the following:

The history of the proceedings had in the case appear to be fully and accurately stated in the brief for appellants; but the issues made by the pleadings and the proven facts appear to be there too narrowly stated.

The petition of H. C. Sweet to the trial court, in substance, alleges, in its statement of the first cause of action, that the deed and contemporaneous written contract were prepared by the parties thereto on Dec. 10, 1890, and were delivered by their respective makers not later than Feb. 10, 1891, as one transaction; that Anna Sweet had no interest, except as wife of H. C. Sweet; that the deed was without any paid consideration, notwithstanding its recital of $10, and was made for the sole purpose of inducing, causing, and empowering the grantees therein to sell and convey the town lots therein described in accordance with said written contract, which required them to use reasonable diligence to sell and convey said lots and collect certain notes therein mentioned and to pay over to the grantors in the deed two-thirds of the gross receipts in cash from the sales of the lots and collections on the notes; that the remaining one-third of such receipts was to be retained by the grantees in the deed as compensation for their services in this regard; that the deed was made to the grantees as agents of the grantors to make such anticipated sales and collections; that the grantees in the deed wholly failed and refused to perform each and every portion of their promises and undertakings in this regard, and, in the spring or summer of 1891, returned and surrendered the notes to said H. C. Sweet, "and, as plaintiff

believes, said deed; but plaintiff, although he has made diligent search and inquiry for the same, has been and is unable to find or learn of the whereabouts of the same, the said deed, and he believes the same has been destroyed in his possession; that at the time said notes were returned and surrendered to plaintiff, and, as he believes, said deed, also, it was understood by and between all of the parties to said deed and to said contract in writing that said deed and said contract was then and there and should thereafter be of no force or effect, and that the transaction of making and delivering said deed and said contract, as aforesaid, was and should be rescinded and vacated;" and that the grant contained in said deed "never was accepted and the benefits thereof taken or the obligations performed on the part of the said grantees, and the uses and purposes of the said deed and the grant have long since wholly ceased in operation and effect."

The second cause of action stated in the petition is based mainly upon the invalid character of the deed; but the facts therein alleged, referring to the status of Greer County lands at the time of the making of the deed and contract, and to the groundless character of H. C. Sweet's claim of title to the town lots at the same time, are, in the main, such as the Court will, perhaps, find to be within its judicial knowledge and may be considered in connection with the first cause of action, although appellees reserved exception to the action of the trial court in sustaining demurrer to same.

The answer made by appellants is as stated in the brief for them; and the issue under the pleadings presented to the trial court and the supreme court of the Territory appear to require a consideration of the facts following:

On or immediately before Nov. 22, 1890, certain persons, including H. C. Sweet and twenty-one others, named in the petition to the trial court (R. p. 9), pur-

chased of Dawson a newspaper, known as the "Mangum Star," published in the town of Mangum, in Greer County, a county over which the State of Texas exercised a precarious jurisdiction until March 16, 1896, when this Court decided it was not a part of that State; and these purchasers are known throughout the record here as the "Mangum Star Printing and Publishing Association," a name adopted on or before Dec. 10, 1890, and an Association that contemplated incorporating under the laws of the State of Texas. (R. pp. 30, 54, and 26-55.)

On Dec. 10, 1890, H. C. Sweet, joined by his wife, signed the deed, the record of which constituted the cloud upon his title of which he complained in his petition to the trial court; and on Feb. 10, 1891, these makers acknowledged the deed before another member of the Association, J. W. Logan, County Clerk of Greer County, Texas (R. pp. 9-17, 30, 26-38, and 54-55); and simultaneously, as a part of the same transaction, the grantees in the deed obligated themselves to sell the town lots which the deed purported to convey and to pay over to H. C. Sweet two-thirds of the gross proceeds therefrom, retaining the remaining portion as their compensation for their services and agency in this regard, and to undertake the collection of certain notes for H. C. Sweet upon the same terms; and this obligation and undertaking of the grantees is embodied in a simultaneous written contract, to be considered as a part of the deed, which contract required the obligors to "use reasonable diligence to sell said lots and collect payment therefor, and to pay over to H. C. Sweet and wife, Anna Sweet, two-thirds of the gross receipts in cash received and collected on all sales of said lots as soon as collected," with a similar provision as to the collection of the notes. (R. pp. 16-17, contract, and 26-55, oral evidence.)

No part of the $10 consideration mentioned in the deed was actually paid. (R. pp. 30-31, 34 and 54, 36 and 55, 37, and 26-55 considered together.)

In the first and fourth enumerations of grantees in the deed, the first being in the acknowledgment of consideration clause and the fourth being in the warranty clause of the same, there are only seventeen names, including H. C. Sweet, the record showing only thirteen in the warranty clause; but in the second and third enumerations, the twenty-two names, including C. J. Edwards as the unnamed member of "F. B. Duke & Co.," are found.

The names that appear in the second and third and not in the first and fourth enumerations being those of J. A. Powers, G. S. Huling, E. A. Winkler and O. P. Elliott; and, as I did so with consent of counsel for appellants, in my brief in the Supreme Court of Oklahoma, I hope this Court will pardon me for going beyond the record here, only to the extent indicated by italics in this paragraph, to say in this connection that ***the deed has, at all times,*** since R. C. Hannah, the custodian member of said Association, surrendered it to H. C. Sweet within one year after its date (R. p. 33), ***been in the possession of H. C. Sweet and his heirs,*** in whose names this action was revived on May 10, 1901 (R. pp. 23-24), ***and shows that the names of J. A. Powers, G. S. Huling, E. A. Winkler and O. P. Elliott were originally written into the consideration and warranty clauses of the deed and afterwards cancelled,*** notwithstanding the fact that the same could not be found at the time of presenting the petition to the trial court.

The contract was signed by nineteen of the grantees named in the deed and by E. R. Launch, although the names of J. A. Powers, G. S. Huling and E. A. Winkler, as alleged in the petition to the trial court, were afterwards cancelled, so that only sixteen names remained to the contract. (R. pp. 16-17.)

The contract recites that the "deed is recorded in Vol. 2, pp. 308-9, deed records of Greer County, Texas"; but, in keeping with the unbusiness-like methods of the

parties throughout the entire imperfect transaction, this recital was evidently inserted after the deed was recorded on June 24, 1891; and, in view of the allegation in the petition to the trial court and the absence of evidence to the contrary, H. C. Sweet must not have known of its recordation until July, 1900, or, if he did, must have forgotten it.

At the time the deed and contract were made, the parties had agreed to incorporate under the laws of Texas, to take the town lots in question over to the corporation, and to transact the business of their agency under said deed and contract in the name of such corporation; but this was not done. (R. pp. 30-31.)

This written contract shows that the mutual profits, to H. C. Sweet, as owner, and to the grantees in the deed, as agents, anticipated from the sale of the lots by the latter was the purpose of the deed; and that there was no other consideration is shown by the testimony of G. H. Eubank (R. pp. 30-31), R. C. Hannah (R. pp. 34 and 54), H. M. Ferguson (R. pp. 36 and 55), O. P. Elliott (R. p. 27), and all the evidence in the case considered together (R. pp. 26-55); and the grantees took the deed merely as agents of the grantors. (R. p. 31.)

Each of the three appellants who testified upon the trial stated that he paid his portion of the $10, mentioned as the consideration in the deed; but two of them admitted that they paid their respective portions to the grantee, who took the acknowledgments of the makers of the deed, J. W. Logan, and not to either of these makers; and the third one was not asked if he had not also paid to Logan instead of to Sweet. (R. pp. 39-53.)

This controversy in regard to this deed arose about nine years after it had been surrendered to H. C. Sweet and at least eight years after the Association had been completely disorganized and the shares of its members sold to Eubank and Thacker (R. p. 48), during which intervening years H. C. Sweet, and, so far as the lots

were occupied by others than himself, claimants under him adverse to appellants had occupied the same without protest from either of appellants, who did not act during those years indicative of any bona fide claim of right under the deed; and this intervening time was sufficient to cause some confusion of subsequent events, including a contest in 1895 involving the question of the removal of the county seat, with the deed and contract transaction in the testimony adduced by the appellants. (R. pp. 26-55, 40, 49 and 50.)

Not only the deed (R. p. 33), but the notes taken for collection were returned to H. C. Sweet (R. pp. 30-31) and the entire imperfect and incomplete transaction had been rescinded by the parties thereto before the expiration of the first year next following its inception (R. pp. 31 and 33, and 26-38) and before the grantees had done any act of consequence under the deed and contract.

The title of H. C. Sweet to the land in question was acquired by him under act of Congress approved Jan. 18, 1897, allowing homesteaders in Greer County to take, in addition to the 160 acres that were free of charge, 160 acres "of which he was in actual possession on March 16, 1896," and it is matter for regret that the record does not fully disclose the facts in this regard; but the Court will, perhaps, take judicial knowledge that under the law and the Departmental rules and principles of procedure, to have secured the entry and patent, H. C. Sweet must have shown the General Land Office that on March 16, 1896, he was in actual possession of the entire tract, except in respect to specified lots occupied by specified persons who acquired possession from and under him or by wrongful intrusion upon his prior possession and who had specifically waived their right to enter the land for town purposes, and that a preliminary showing of such a state of facts must have been made in H. C. Sweet's application for entry, before the Depart-

ment ordered a publication of any notice to adverse claimants in this regard.

In a negative way, the evidence shows that the deed and the claims of appellants thereunder were in no wise involved or considered in the making of said entry by H. C. Sweet and its allowance by the Department, although one of the appellants testifies in a way that somewhat confuses the attitude of H. C. Sweet towards bona fide occupants and all who waived their rights in respect to making entry of the land for town purposes with his attitude towards appellants, but the fact that not one of the appellants demanded a deed of him after he acquired title by patent and that the witness, L. J. Edwards, one of the appellants, in testifying in this regard, said: "No, sir, he did not say anything about these particular lots," in answer to inquiry as to whether H. C. Sweet, in connection with his entry and acquisition of title, gave any assurance as to the claim under this deed (R. pp. 26-55 and 44), is brought to the attention of the Court in this connection.

At the date of the deed and contract and until H. C. Sweet obtained title by patent from the United States on Oct. 13, 1898, he had and could have had no right, title or interest, nor color thereof, touching any portion of these lots, whether this question be viewed from the standpoint of the United States or from that of the State of Texas in respect to the lands of Greer County at the time.

Only seven of the original twenty-two, including C. J. Edwards, who is not specifically named in the deed, of the grantees have made defense against this action, and two of these seven are not included in the warranty clause of the deed.

When this action was brought in the trial court, ~~eight~~ more of the original grantees promptly filed disclaimers herein (R. pp. 18-21), as did W. L. Pendergraft, as legal representative of I. L. Pendergraft, one of the three de-

ceased grantees, including C. J. Edwards, and one of the two whose heirs are making defense.

Except as the same may be at variance with the foregoing statement, the opening statement in brief for appellants appears to be correct, and reference is made to it to supply any omissions here.

ARGUMENT.

I.

Referring to first and second assignments of error and answering argument of counsel for appellants in support of same,

The case of Halsell v. Renfrow, cited and quoted by counsel for appellants as holding that:

"A real estate broker, who has lands placed with him for sale, has no authority to receive money on the purchase price of such lands,"

is, in effect, merely a decision that such broker, without having either the legal or equitable title, or the actual possession of the property, has no implied authority to collect the price for which he sells the lands of his principal; and it is not conceivable that counsel mean to contend that such authority may not be given without destroying the relationship of principal and agent between the parties, nor does the case cited bear upon any phase of any question involved here.

Agency is the relation, created by express or implied contract, or by law, whereby one party sui juris, called the principal, constituent, or employer, delegates the transaction of some lawful business, with more or less discretionary power, to another party, called the agent,

attorney, proxy, or delegate, who undertakes to manage the affair and render to him an account thereof. 1 Am. & Eng. Enc. L. (sec. ed.) 937-8.

Whether a contract is one of sale or merely creates an agency depends upon the intention of the parties as legally ascertained. One of the main tests applied is to inquire whether an option is given the transferee to pay for the goods and keep them. In such a case the transaction is a sale, and the title passes absolutely. 24 Am. & Eng. Enc. L. (sec. ed.) 1027-8.

See, also, Columbus Construction Company v. Crane Company, 52 Fed. Rep. 635, 9 U. S. App. 46.

That the principles to be applied in determining whether an agency and trust or seller and purchaser relationship is created are the same in respect to real as in respect to personal property is confidently assumed; and, it being clear that the grantees in the deed were in duty bound to obtain the highest possible prices for the lots in the open market and had no authority to fix for themselves a price and retain the lots at such price, it is certain that the deed and contract created some other relationship than that of vendor and vendee or of seller and purchaser.

In order to determine what was intended by a deed, separate and different instruments may be construed together, where they are executed at the same time or simultaneously, and relate to the same subject matter and are between the same parties, or are parts of the same transaction (13 Cyc. 614-615, citing numerous cases); and hereinafter the deed will frequently be mentioned alone as including the contract simultaneously executed by the grantees.

Although there is, in this deed, a suggestion of a partnership relation, a suggestion of an express trust, and a suggestion of a "condition subsequent," it appears

quite certain that the actual relationship, in the first instance, was that of principal and agent, with an express trust feature, followed by an implied or resulting trust in favor of the grantors upon the failure and refusal of the agents to sell the lots and their surrender of the deed to the grantors, if the deed was not void and incapable of creating any relationship whatever.

Assuming the validity of the deed for the purpose of the present argument only, the agent and trustee characters of the grantees appear to be clear in the light of the propositions and cases following:

When land has been conveyed by an absolute deed, the intention of the parties not being to confer on the grantee the beneficial interest, but merely to facilitate the accomplishment of some specific purpose, it has been held that the purpose of the conveyance may be shown by parol and thereby a resulting trust may be raised in favor of the grantor. 15 Am. & Eng. Enc. L. 127, citing Beadle v. Beadle, 2 McCrary (U. S.) 586; Pierson v. Pierson, 5 Del. Ch. 11; Rice v. Rice, 107 Mich. 241; Thompson v. Thompson, 30 Neb. 487; Stubblefield v. Stubblefield (Tex. Civ. App.), 45 S. W. 965; Wallace v. Lewis, 60 Tex. 247; and Reeves v. Bass, 39 Tex. 618.

A resulting trust may arise and result to the grantor, as stated by Judge A. C. Freeman in his notes to Neill v. Keese (Tex. 1849), 51 Am. Dec. 756-7, in either of the following cases:

"(1) When property is conveyed in trust for particular objects or purposes, which fail by lapse or otherwise, resulting trust will arise for the benefit of the grantor, if the property is not otherwise disposed of. 2 Pomroy's Eq. Jurisprudence, sec. 1032-3; 1 Perry on Trusts, sec. 160; 2 Story's Eq. Jurisprudence, sec. 1200, and cases cited: Ackoyd v. Smithson, 1 Bro. C. C. 503; Williams v. Coade, 10 Ves. 500; Crews v. Boyle, 3 P. Wms. 22; Spink v. Lewis, 3 Bro. C. C. 355; Davenport v. Coltman, 12 Sim. 610; Hutchinson v. Hammond, 3 Bro. C. C.

128; Hawley v. Jones, 5 Paige 318; Muckleston v. Brown, 6 Ves. 63; (2) When property has been granted in trust for some purpose which is illegal, as in contravention of some statute or policy of the law, the trust is void, and a resulting trust arises in favor of the grantor or his heirs. Carrick v. Errington, 2 P. Wms. 361; Pilkington v. Broughey, 12 Sim. 114; Turner v. Russell, 10 Hare 204; Tregonwell v. Sydenham, 3 Dow. 194; Cook v. Stationers' Co., 2 Myl & K. 262; Paige v. Leapingwell, 18 Ves. 463; Lemon v. People, 6 Ired. Eq. 137; Stevens v. Ely, 1 Dev. Eq. 493, etc.; and (3) When a trust is too uncertain, indefinite and vague to be carried into effect." Citing authorities.

Resulting trusts are those which are implied by law, in conformity with the presumed intent of the parties from the nature and character of their transactions. The Modern Law of Real Property, sec. 93.

See, also: Tiedman on Real Property, sec. 499, and Modern L. of R. P. sec. 109.

A conveyance with the understanding that the grantee, in assuming title and control of the property with discretion as to a sale, is to pay out of his own means obligations of the grantor, and, after sale and satisfaction of debts, to share with him the excess, if any, creates a trust and not a mortgage. Flagg v. Walker, 113 U. S. 659.

A trust is where there are interests distinct from legal ownership. Seymour v. Freer, 8 Wall. 213; Wallace v. Wainwright, 87 Pa. 263.

When agent takes title in his own name he holds as trustee of a resulting trust for his principal (Irvine v. Marshall, 20 How. 561-563; Sanford v. Sanford, 139 U. S. 646; Brainerd v. Buck, 184 U. S. 105); and in case he takes title from his principal, but only to facilitate conveyance to such purchasers as he may find in accordance with the duties of his agency, an application of the same

principle would raise a resulting trust in favor of his principal upon his failure to find such purchasers and his abandonment of his agency without selling the property.

Resulting trust was held to arise in the following case which, also, appears to be in point here:

Wood v. Perkins (C. C.) 57 Fed. 258;

Also, see: Neale v. Hagthrop, 3 Bland. 551.

This deed was not intended to do more than invest the grantees with the legal title for the sole purpose of conveying the lots to other persons in the course of their agency in this regard; and, if it can have the effect of passing the legal title, a resulting trust must certainly arise under the facts in the case.

An error into which counsel for appellants have fallen in arguing this, as well as the other assignments, is the assumption that the deed actually conveyed and passed title at the time it was executed; but, if such had been the case, the relationship of principal and agent thereby created would not be impaired by the fact.

II.

Referring to the third assignment of error and answering the argument of counsel for appellants in support of the same,

It is conceded that, as a general rule, "the return to the grantor or destruction of a deed to land will not revest grantor with title," although in the text of 9 Am. & Eng. Enc. L. (sec. ed.) 1164, citing a number of cases in note thereto, it is stated that "this rule is, however, in effect, denied in Maine, Massachusetts and New Hampshire, where it is held that where the grantee, without mistake or fraud and in pursuance of a fair agreement, redelivers the deed to the grantor, he is estopped as

against the grantor, his heirs and assigns, from asserting title," and, in 2 Supplement to same 397, text 164, note 2, Shepley v. Ledig, 189 Ill. 197, and Patterson v. Carson (Tenn. Ch. 1898), 48 S. W. Rep. 383 are cited as holding that redelivery creates estoppel.

That "the setting up of an estoppel by deed may be prevented by an estoppel in pais as against the grantee," appears to be well established.

11 Am. & Eng. Enc. L. (sec. ed.) 392;

Platt v. Squire, 12 Met. (Mass.) 494;

Haney v. Roy, 54 Mich. 635.

The same principle appears to have been applied in the case of Boynton v. Haggart (C. C. A.) 120 Fed. Rep. 819, where an estoppel by judgment was allowed against an estoppel by deed.

Under the recording acts of Wisconsin, where parties destroyed unrecorded deed, it is inoperative against a purchaser for value, without notice. Parker v. Kane, 63 U. S. (22 How. 16) 1.

"After the redelivery of the deed to the grantor, and the unequivocal acts of abandonment on the part of the grantee of the contract,—as here, to support the grantor, etc.,—which formed its consideration, equity will cancel the deed as a cloud on title." Huffman v. Huffman, 69 Tenn. (1 Lea) 491, as cited in sec. 551, column 739, Vol. 16 Am. Dig., Century Edition.

"Only the equitable and not the legal title passes under an unregistered deed, and the contract may be rescinded by the parties by the redelivery of the deed and return of the consideration" (Davis v. Inscoe, 84 N. C. 396); and "the surrender of an unrecorded deed restores the legal title to the vendor as between the parties, where no intervening interests have attached." Austin v. King, 91 N. C. 286; and Fortune v. Watkins, 94 N. C. 304, as cited id.

"Where the grantee in an unrecorded deed surrenders to the grantor his interest in the land, and returns the deed, the grantor is thereby invested with such an equitable interest as will be a good defense to a suit by the grantee to establish title." Happ v. Happ, 156 Ill. 183, 41 N. E. 39, and, to the same effect, Fitch v. Conyne, 65 Ill. 83, as cited id.

The record of the deed here is back of the patent from the United States, the original source of title, and would not be notice to innocent purchasers from H. C. Sweet or his vendees since Oct. 13, 1898; and such a record does not appear to be any insuperable obstacle to the recision of the entire contract by the acts of the parties in returning the deed and abandoning the purpose for which it was made, even though the deed had passed title.

But here the grantees surrendered the deed and abandoned the contract about seven years before it could have had the effect of passing title to them, by way of estoppel upon which they now rely; and, in view of the status of Greer County lands at the time, this deed cannot be considered as more than an executory contract in respect to the title to the lots.

That the grantees could take title only by way of estoppel, is incontestable; and the general rule is that "if a grantor having no title, a defective title, or an estate less than that which he has assumed to grant, conveys with warranty, or covenants of like import, and subsequently acquires the title or estate which he purported to convey, or perfects his title, such after acquired title will inure to the grantee or to his benefit, by way of estoppel. 16 Cyc. 689, citing, among a number of cases. Stone v. Sledge, 87 Tex. 49, and Lindsay v. Freeman, 83 Tex. 259.

To the same effect are:

Terret v. Taylor, 9 Cranch 53;

Barry v. Gratz, 4 Wheat. 222;

Bush v. Marshall, 6 How. 291;

Irvine v. Irvine, 9 Wall. 625;

Meyers v. Croft, 80 U. S. (13 Wall.) 291;

Moore v. Crawford, 130 U. S. 131;

Ryan v. United States, 136 U. S. 68;

Falks v. Kamp (C. C.), 3 Fed. 898;

Curran v. Bardsall (D. C.), 20 Fed. 835;

Crawford v. Moore (C. C.), 28 Fed. 824.

The ground upon which the doctrine is usually based is the prevention of circuity of action (11 Am. & Eng. Enc. L. 405, and notes thereto); and it appears that this estoppel should not be allowed in a case in which the facts would defeat an action by the grantees for breach of warranty, certainly not to effect such an inequitable and unjust end as that for which it is invoked by appellants here, where, instead of preventing a fraud upon the grantees, it would operate so as to effect a fraud upon the grantors and those claiming under him since he obtained his patent from the United States.

That the deed was invalid and that, for this reason, the covenant of warranty cannot work an estoppel against the subsequently acquired title of H. C. Sweet appears clear, in view of the laws of both the United States and the State of Texas relating thereto.

United States v. Texas, 162 U. S. 1;

Acts of Congress relating to Greer County, approved May 2, 1890, and Jan. 18, 1897, respectively;

Day Land and Cattle Co. v. State, 68 Tex. 526.

On Dec. 30, 1887, the President issued a proclamation asserting jurisdiction over the county to be in the United States, asserting that said county was a portion of the Indian Territory, and admonishing and warning "all persons, whether claiming to act as officers of the County of Greer, in the State of Texas, or otherwise, against selling or disposing of, or attempting to sell or dispose of, any of said lands or from exercising or attempting to exercise any authority over said lands."

Messages and Papers of the Presidents, Vol. 8, pp. 740-1.

A deed acknowledged before a grantee is invalid.

Brown v. Moore, 38 Tex. 646.

Such a deed is not entitled to record, and its record is of no effect.

Heintz v. O'Donnell, 17 Tex. Civ. App. 21, 42 S. W. 797.

A void conveyance cannot work an estoppel against a title subsequently acquired by either party thereto.

Harkness v. Underhill, 66 U. S. (1 Black) 316;

Powell v. Patterson, 100 Cal. 236, 34 Pac. 677.

An invalid deed creates no estoppel.

Faulk v. Calloway, 123 Ala. 325;

Van Dyke v. Van Dyke, 119 Ga. 830;

Altemus v. Nichols (Ky. 1903), 74 S. W. Rep. 221;

Smith v. Ingram, 130 N. C. 100.

The rule that, where a vendor has not title and sells, any title afterwards procured by him will inure to the benefit of the purchaser, does not apply in cases in which such sale was prohibited by law, as in the case of a sale of public lands so prohibited.

Atkinson v. Bell, 18 Tex. 474;

Holmes v. Johns, 56 Tex. 41.

While it is true that courts have generally refused to cancel instruments void up their faces, their power to cancel them does not appear to be denied; and, in the case of the Day Land and Cattle Co. v. The State of Texas, hereinbefore cited, the Court cancelled patents to lands in Greer County upon the ground of their invalidity, the rule appearing to be that "the setting aside and cancellation of void instruments by courts of equity is a matter of discretion in the court, and not of absolute right in the parties asking the cancellation."

Hamilton v. Cummings, 1 Johns. Ch. 517;

Porter v. Jones, 46 Tenn. (6 Cold.) 313;

Also, see: Hays v. Hays, 2 Ind. (2 Cart.) 28, as holding that equity will cancel instrument void on its face.

There appears to be no question but that equity will cancel a void instrument when the fact of its being void is not apparent on its face.

Bunce v. Gallagher, Fed. Cas. No. 2,133 (5 Blatchf. 481).

III.

Referring to fourth and sixth assignments of error

and answering argument of counsel for appellants in support of the same,

The "mere failure of the consideration named in a deed cannot be shown for the purpose of defeating the conveyance," is a proposition urged by counsel for appellants and, notwithstanding cases to the contrary, this is conceded to be the general rule; but the rule is not applicable to the case here, where it is not the "mere failure of consideration," nor the defeat of the conveyance, that is involved, the character and purpose of the conveyance and the failure of such purpose being the question here.

The fact that there was no consideration for a deed may be shown; but not by the grantor to defeat the operation of a deed, is the language of 3 Enc. of Ev. 375; and, as supporting the proposition that such want of consideration may be shown, the following cases are there cited:

Renshaw v. First National Bank (Tenn.), 63 S. W. 195;

Ewing v. Wilson, 132 Ind. 223, 31 N. E. 64;

Grosbeck v. Seeley, 13 Mich. 329;

Lyford v. Thurston, 16 N. H. 399;

and, as being contrary to the qualifying statement that it cannot be done by the grantor to defeat the operation of the deed, the following cases are there cited:

Hebbard v. Hughian, 70 N. Y. 54;

Eckler v. Alden, 125 Mich. 215, 84 N. W. 141.

The true doctrine appears to be that "as between the parties and those claiming under them a deed cannot be impeached on the ***sole*** ground of a want of consideration. But an executory agreement or an imperfect con-

veyance, without a valid or meritorious consideration, will not be enforced in equity against the promisor or grantor or his personal representative or subsequent voluntary grantees; and, *a fortiori*, it will not be enforced against subsequent grantees for a valuable consideration."

13 Cyc. 534-535, citing

Burton v. Leroy, 4 Fed. Cas. No. 2,217.

Article 272, Title XII, Revised Statutes of Texas, of 1897, in force at the time of the execution of the deed, provides that want or failure or partial failure of consideration for any instrument in writing is a sufficient defense against any action on the same; and it would appear that the spirit of this statute would permit the want of consideration to be shown as against an estoppel urged upon the ground of a warranty in a deed that passed no title at the time it was executed, especially where the grantor retained possession of the property, as here; but, be the effect of this statute what it may, this case is not within the inhibition of the rule urged by counsel for appellants and the court below is not in error in this regard:

Beaumont Car Works v. Beaumont Imp. Co., 4 Tex. Civ. App. 257;

Wigmore on Evidence, sec. 2437;

Ames Cases on Trusts, 1st ed., pp. 291, 295-330;

Horner v. Chicago, M. & St. P. Ry. Co., 38 Wis. 165;

Andrews v. Andrews, 12 Ind. 348;

Ewing v. Wilson, 132 Ind. 223;

Same v. Justice, 132 Ind. 600;

Same v. Fernold, id.;

Bryson v. Bryson, 75 Cal. 525;

Kerr v. Calvit, 1 Miss. (Walk.) 115.

Here, the proof of want of consideration was not for the "sole" purpose of defeating the operation of the deed; but it was a part of the evidence showing the agency and trust character of the deed and the subsequent resulting trust.

IV.

Referring to fifth assignment of error and answering argument of counsel for appellants in support of the same,

The evidence was ample to justify the trial court in finding and the Supreme Court of Oklahoma in approving the finding that no part of the $10, mentioned in the deed as the consideration, was paid; and it must be presumed that the trial court so found and the Supreme Court of Oklahoma so approved.

9 Enc. of Ev. 937, citing cases.

For the reasons hereinbefore stated, I respectfully submit that there was no error in the judgment of the court below and that the same should be affirmed.

CHARLES M. THACKER,
For Appellees.

Office Supreme Court, U. S.
FILED.
FEB 15 1908
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 156.

J. G. BOGARD ET AL., APPELLANTS,

vs.

F. H. SWEET ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLEES.

CHARLES M. THACKER,
For Appellees.

(20,461.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 156.

J. G. BOGARD ET AL., APPELLANTS,

vs.

F. H. SWEET ET AL., APPELLEES.

SUPPLEMENTAL BRIEF FOR APPELLEES.

Statement.

The statement in the main brief for appellees appears to admit of no qualification and of but little amplification, but of the latter nature the following is respectfully submitted:

The fact that the contemporaneous written undertaking of the grantees is dated December 10, 1890, and refers to the deed as being of the same date, while the purchase of the "Mangum Star" was on or before November 22, 1890, and the fact that neither the deed nor undertaking of grantees makes any reference to said purchase of the newspaper tend strongly to show absence of connection between said purchase and the consideration for the deed; but the fact that the purchase of the newspaper was no part of the considera-

tion for the deed is also proven by the parole evidence (R., pp. 34, 35, and 55); and that the deed was without consideration, other than the "particular objects and purposes" stated in the main brief, is here emphasized.

The facts that the deed of the grantors and the said undertaking of the grantees were dated, in the latter, on December 10, 1890; that the latter was not acknowledged until on December 13, 1890, and the former on February 10, 1891; that the deed was not recorded until June 24, 1891, to which record reference is made in said undertaking, and that the names of some of the orginal parties were, after these instruments were prepared, stricken therefrom suggest a question as to whether the deed was ever effectively delivered and accepted, and as to whether changes in parties corresponded with transfers of shares of stock in the Association.

In connection with the statement that of the nine members of the Association, including two deceased ones here by representation, who are the appellants, the names of only seven, or, excluding the two deceased, only five are found in the consideration and warranty clauses of the deed, the record here showing only four of said seven and only three of said five in the warranty clause, it may be noted that while one of said two deceased, being also one of said four in said warranty clause, is here as an appellant by representation, W. L. Pendergraft, as his sole devisee and legatee, filed disclaimer herein with the other nine disclaimers. Although the proof in this record is not very satisfactory, the grantors occupied the lots as a homestead at the time of making the deed.

ARGUMENT.

I.

Referring to first and second assignments of error and further answering argument of counsel for appellants in support of same:

In the main brief for appellees some of the cases were cited upon the authority of encyclopedias and digests, as there indicated; but, subsequent examination of practically all of such cases having been made, it is found that all such cited under this subdivision of the argument are correctly cited.

In the case of Reeves *v.* Bass, 39 Tex., 619, cited on page 11 of the main brief, it is held that parole evidence was admissible to show that a conveyance was in trust for the grantor, who was to have the use and control of the property during his life, and that the deed was to operate as a testamentary devise at his death.

The trust character of the deed is clearly shown by the contemporaneous written undertaking of the grantees; and this character is also shown by parole evidence.

That "parole evidence is admissible to show the purpose for which an instrument was executed, and that its design and object were different from what its language, if alone considered, would indicate," is the language of 21 Am. & Eng. Enc. L. (sec. ed.), 1111, citing cases from twenty-six States.

That "parole evidence is admissible to show that a deed conveying the property was intended to creat a trust in the grantee" is the language of 9 Enc. of Ev., 443, citing, besides English cases, cases from 14 States, including the following, which have been examined and, being Texas cases, are deemed of special interest in determining the rights of

the parties under a deed presumably made in deference to the laws of that State:

Meade *v.* Randolph, 8 Tex., 191.

Barnett *v.* Houston, 18 Tex. Civ. App., 134; 44 S. W., 689.

Smith *v.* Eckford, 18 S. W., 210.

Black *v.* Caviness, 2 Tex. Civ. App., 118; 21 S. W., 635.

Also, see Collar *v.* Collar, 75 Mich., 414; 42 N. W., 847.

Clark *v.* Haney, 62 Tex., 511; 50 Am. Rep., 536.

In Meade *v.* Randolph, *supra*, it is held that—

"Parole evidence is admissible to prove that a deed or instrument absolute on its face was executed and delivered upon certain trusts not reduced to writing, and which the grantee promised to perform; and this may be established."

The above case is peculiarly interesting and instructive in this connection; and, among other things, it is stated in the opinion that—

"The declaration or creation of trusts stands in this State as it did at common law in England before the passage of the statute of frauds and purjuries. The subject was considered in the case of James Fulcrod, decided at Galveston, January term, 1851 (5 Tex. R., 512), and it was there held that the only contract in relation to lands which was required to be in writing by the statute of frauds and fraudulent conveyances was the contract for their sale; and that express trusts in relation to lands stand upon the same footing with implied or constructive trusts; that the facts from which resulting trusts arise and the special contracts by which express trusts are created may alike be proved by parole evidence."

The other Texas cases cited *supra* are in line with Meade *v.* Randolph; and in Barnett *v.* Houston, *supra*, it is said:

"That a deed absolute upon its face may be shown to have been intended to be held by the grantor in subordination

to a use or trust, and so enforced by a court of equity, is not disputed (Cook *v.* Cook, 77 Tex., 85; 13 S. W., 847). If Elizabeth Barnett had provided that, after the use to which the deed was to be applied, the land, or what remained of it, should be returned to her, there is no doubt that she could have enforced the return of it, or the remainder of it; and we can see no reason why she could not have provided that the residue should go to some one else. The evidence was sufficient to authorize a finding in favor of the parole trust alleged."

In Collar *v.* Collar, *supra*, a Michigan case, it is held that—

"When cotenants join in conveying land to a person under a verbal agreement that he shall sell it and pay to each cotenant his share of the proceeds, the trust may be proved, by parole evidence, in an action by one of the cotenants against the grantee to recover his share of the proceeds as money had and received."

According to notes to 6 L. R. A., 47, in the following cases it is held as follows:

"Oral or written testimony showing the circumstances of a transaction and the intention of the parties is admissible to prove or disprove an implied trust (Moore *v.* Stinson, 4 New Eng. Rep., 654; 144 Mass., 594)."

"Or resulting trusts (*ibid.;* Beck *v.* Beck, 8 Cent. Rep., 548; 43 N. J. Eq., 39; Jackson *v.* Jackson (Pa.), 7 Cent. Rep., 850)."

"Or to show that the grantee in an absolute conveyance agreed to hold the land in trust for the grantor's benefit (Morrall *v.* Waterson, 7 Kan., 199)."

"Or to show that an unwritten declaration of trust was made contemporaneously with the making of the title under which it is declared (McVay *v.* McVay, 8 Cent. Rep., 596; 43 N. J. Eq., 47)."

According to notes to 10 L. R. A., 401, in the following cases it is held as follows:

"A resulting trust may be established by parole evidence; but such evidence must be clear and unequivocal (Walter *v.*

Snowden (Pa.), 6 Cent. Rep., 731; Bates *v.* Kelly, 80 Ala., 142; Reynolds *v.* Coldwell, *id.*, 132; Philpot *v.* Penn, 8 West. Rep., 266; 91 Mo., 38; Jackson *v.* Wood, 3 West. Rep., 795; 88 Mo., 76; Shaw *v.* Shaw, 3 West. Rep., 254; 86 Mo., 594; Bibb *v.* Hunter, 79 Ala., 351; Botsford *v.* Burr, 2 Johns. Ch., 409; 1 N. Y. Ch., L. Ed., 430; Gillespie *v.* Moon, 2 Johns. Ch., 601; 1 N. Y. Ch., L. Ed., 507; Collins *v.* Collins, 6 Lans., 371; Loundsburry *v.* Purdy, 16 Barb., 376, 382; McCartney *v.* Bostwick, 32 N. Y., 59; Fluharty *v.* Beatty, 4 W. Va., 521; U. S. Bank *v.* Carrington, 7 Leigh, 566; Swinburn *v.* Swinburn, 28 N. Y., 568; Chester *v.* Bank of Kingston, 16 N. Y., 336; Reid *v.* Fitch, 11 Barb., 399)."

According to notes to 20 L. R. A., 108-109, "in an action by the grantor to set aside the deed," in the following cases it is held as follows:

"But parole evidence is allowable that no consideration was paid for a deed defectively executed by not being sealed, for the purpose of destroying its effect and preventing an enforcement of the sale (Hanson *v.* Micholson, 19 Wis., 499)."

"In Brown *v.* Brown, 106 Mo., 611, parole evidence was admitted without objection at the trial that no consideration was paid for a deed, and on appeal it was held that the evidence was proper for the purpose of showing adverse possession by the grantor, after giving the deed."

"In an action to cancel for non-performance by the grantee of his agreement a deed reciting one dollar and other good and valuable considerations, parole evidence may be given that the actual consideration was the grantee's promise to do certain things, and the benefit the grantor expected to realize therefrom (Piedmont Land and Improvement Co. *v.* Piedmont Foundry and Mach. Co. (Ala.), June 9, 1892)."

"Also that no consideration passed for a deed reciting one of $4,000.00, and that the grantee was a mere conduit for transferring the title to a third person in trust for the grantor's wife, and where the plaintiff, in his petition to set aside the deed, alleges that no consideration has passed,

he cannot rely upon the inadequacy of the consideration expressed in the deed (Hollocher *v.* Hollocher, 62 Mo., 267)."

The following additional cases, cited under another subdivision in the main brief, are also here cited as holding that the trust may be shown by parole and the expressed consideration disproved:

Renshaw *v.* First National Bank (Tenn.), 63 S. W., 195.
Ewing *v.* Wilson, 132 Ind., 223; 31 N. E., 64.
Lyford *v.* Thurston, 16 N. H., 399.
Grosbeck *v.* Seely, 13 Mich., 329.

It is in the nature of a fraud for one to whom land is conveyed as trustee to deny the fact that the land was so conveyed and to claim it for himself (Rochefoucauld *v.* Boustead (1897), 1 Ch., 196; 66 L. J. Ch., 74, 75; L. T. N. S., 502; also see Brison *v.* Brison, 75 Col., 525; 7 Am. St. Rep., 189).

The correct rule, as stated in 28 Am. & Eng. Enc. L., 910 (sec. ed.), is as follows:

"*Trusts Established in Equity to Prevent Fraud.*—Whenever the title to real or personal property, or a profit therefrom, is obtained by one person under such circumstances as would render his retention of such title or profit an actual or constructive fraud on another who in justice and right is entitled thereto, equity, in order to satisfy the demands of justice, will consider the subject-matter as impressed with a trust in favor of him who is beneficially entitled, enforceable against the holder of the legal title or any one claiming under him voluntarily or with notice" (citing many cases, among which are Moore *v.* Crawford, 130 U. S., 128, and Keech *v.* Sanford, 1 White and T. Lead. Cas. (6th ed.), 53, and notes).

In a case like this, in an action by the grantor against the grantee to set aside the deed, there is a line of cases holding that the grantor will not be permitted to contradict by parole evidence the recital in the deed of consideration therefor for

the purpose of engrafting a trust upon the conveyance, where the deed is absolute and is perfectly executed and delivered and there is neither other writing between the parties nor extraneous matters militating against or affecting the character of the conveyance; but in this case the deed and contemporaneous written undertaking of the grantees, with their imperfections and the extraneous facts in respect to the status of the lands of Greer county at the time and the confidential relations existing between H. C. Sweet and the other parties as partners in the association and joint grantees in the deed, clearly take this case out of the rule applied in those cases; and there is a strong line of cases, permitting impeachment of the consideration for such purpose, although it is not conceded that impeachment of the recited consideration is necessary to engraft a trust upon an absolute deed.

The deed and contemporaneous written undertaking of the grantees, considered together without the aid of parole evidence, create an express trust, which, upon the failure of the grantees to sell the lots, was followed by an implied or express trust in favor of the grantor; but, if the deed was absolute and there was no such writing, the principles followed by the courts in the foregoing cases justify the finding of such a trust in the parole evidence itself.

The court below certainly did not err in any respect vulnerable to appellants' first and second assignments of error.

II.

Referring to third assignment of error and further answering argument of counsel for appellants in support of same:

The case of Shepley *v.* Ledig, 189 Ill., 197, cited on page 14 of main brief upon the authority of the Am. & Eng. Enc. of L. (Supplement to sec. ed.), is found to be not in point and erroneously cited; but the other cases cited upon the

authority of encyclopedias and digests are in point and correctly cited.

On page 17 of the main brief, however, it is erroneously stated that "a deed acknowledged before a grantee is invalid," and that statement is here corrected to read as follows: An acknowledgment before a grantee in a deed is invalid; and, in the State of Texas, where the acknowledgment by the wife is essential to convey a homestead, by reason of article 636, title 20, Sayles' Texas Civ. Statutes, the deed itself is invalid to convey a homestead. Besides case of Brown *v.* Moon, 38 Texas, 646, cited in this connection in main brief, see the following:

Hogans *v.* Carruth, 18 Fla., 587.
Wason *v.* Connor, 54 Miss., 351.
Jones *v.* Porter, 59 Miss., 628.
Green *v.* Abraham, 43 Ark., 420.
Wilson *v.* Traer, 20 Ia., 231.
Hamners *v.* Dale, 61 Ill., 307.
West *v.* Krebaum, 88 Ill., 263.
Stevens *v.* Hampton, 46 Mo., 404.
Dail *v.* Moore, 51 Mo., 589.
Grosbeck *v.* Seeley, 13 Mich., 329.
Davis *v.* Beazley, 75 Va., 491.
Withers *v.* Baird, 7 Wats (Pa.), 227.

That the lots must be regarded as the homestead of the grantors, without regard to whether Sweet had the title thereto, if the grantors occupied them as such, so that a valid deed must have been properly acknowledged, appears:

Wheaton *v.* Griffin, 60 Tex., 209.
Morris *v.* Geisecke, 60 Tex., 633.
15 Am. & Eng. Enc. L. (sec. ed.), 668.

At common law a deed was void unless the grantor was seized of the land (Small *v.* Proctor, 15 Mass., 495; 4 Done's Abr., 16, and Washburn on Real Property, vol. 1, p. 67),

and a covenant of warranty will not run with the land so as to estop the grantor from setting up after-acquired title when he was seized neither of the title nor the possession at the time of making his deed (3 Washburn on Real Property, p. 159); and the alternative of regarding the lots as of the homestead or the grantors lacking in both title and possession suggests itself.

The deed was invalid, both because forbidden by law and because not acknowledged before a person other than a grantee, and no estoppel of warranty can arise from such a deed; but, if this were not so, the appellants are clearly estopped by their acts to assert title.

The estoppel *in pais* here urged against the appellants is peculiarly strong.

In 1891 they abandoned the purpose for which the deed was made without having taken possession of the property or done any act of consequence so much as indicating acceptance of the grant. The custodian of the deed returned it to the grantor as a final token of the rescission and cancellation of the entire contract in 1891. The appellants and other grantees at least quietly acquiesced in the action of the custodian of the deed in this regard and, without any act indicating claim of right under it, permitted the grantor to continue his possession of the property, and in October, 1888, to acquire title by patent from the United States, at the expense of exhausting his rights under the act of Congress of January 18, 1897, in entries that included, instead of excluding, the lots of the deed. After a silence of more than nine years, during which time the changes incident to the growth of a village into a town of considerable local importance occurred, without thought of such deed, the appellants call attention to the existence of the record of the deed, and when this action is brought to cancel it, assert title by estoppel by virtue of the warranty; and at the trial in the district court, about twelve years after the surrender of the deed to H. C. Sweet, the only ones—three—who testify in

their behalf admit to have done no act, except the resistance of the action, indicative of or consistent with their claim of title.

Are they not estopped to assert title in themselves in the light of these facts?

Besides the authorities cited in the main brief in support of the estoppel *in pais* here urged, attention is asked to the case of Chippewa Lumber Company *v.* Tremper, 75 Mich., 36, where it is held that, in an action for breach of a covenant not to engage in the sale of liquors, the rejection of evidence to show that plaintiff's sole business manager was interested in a drug company which he knew was selling liquor in the town in question, in violation of a like covenant to plaintiff, was held error.

III.

Referring to fourth and sixth assignments of error and further answering argument of counsel for appellants in support of same:

The cases cited upon authority of 3 Enc. of Ev., 375, at page 19 of the main brief, are correctly cited and appear to be very valuable cases in this connection; but Hebbard *v.* Hugian, 70 N. Y., 54, does not so strongly as Eckler *v.* Alden, 125 Mich., 215, support the proposition upon which they are there cited.

In 6 Cyc., 286, it is stated that—

"A contract or conveyance which is improvident or based on an inadequate consideration will not be set aside for these reasons alone, unless, as the rule is generally stated, the improvidence or inadequacy is so great as to furnish of itself convincing evidence of fraud." * * *

While want of consideration, inadequacy of consideration, or failure of consideration, in case of perfect and absolute deed reciting a consideration and conveying the prop-

erty, when standing alone, according to many authorities, is not ground for setting aside the deed, either of these facts may be governed by circumstances which justify setting it aside:

McClelland *v.* McClelland, 176 Ill., 83; 51 N. E., 559.
Bevins *v.* Keen, 64 S. W., 428; 23 Ky. L. Rep., 757.
Payett *v.* Ferrier, 20 Wash., 479; 55 Pac., 629.
Lockwood *v.* Lockwood, 124 Mich., 627; 83 N. W., 613.
Pironi *v.* Corrigan, 47 N. J. Eq., 135; 20 Atl., 218.
Hollingshead *v.* McKenzey, 8 Ga., 457.
Dickinson *v.* Dickinson, 24 Neb., 530; 39 N. W., 429.
Vincent *v.* Walker, 93 Ala., 165; 9 Southern, 382.
Steele *v.* Richardson, 24 Ark., 365.
Jackson *v.* Sebring, 16 Johns., 515; 8 Am. Dec., 357.
Life Ins. Trust Co. *v.* Cole, 4 Fla., 359.

In the case of Fowlkes *v.* Lea, 84 Miss., 509; 68 L. R. A., 925, apparently a well-considered case, the court, referring to the acknowledgment of receipt of consideration in the deed, said:

"But this acknowledgment of payment is, in effect, merely a receipt, and may be contradicted by parole. It was contradicted by parole in this case."

For the reasons stated in the main brief, as supplemented by this, it is respectfully submitted that the judgment of the court below should be affirmed.

CHARLES M. THACKER,
For Appellees.

BOGARD *v.* SWEET.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

No. 156. Submitted March 6, 1908.—Decided April 27, 1908.

A decree of Supreme Court of Oklahoma cancelling a deed given to defendant below in furtherance of a scheme of development of property which had been abandoned, affirmed on the facts.
17 Oklahoma, 40, affirmed.

THE facts are stated in the opinion.

Mr. John W. Shartel, Mr. James R. Keaton and *Mr. Frank Wells* for appellants.

Mr. Charles M. Thacker for appellees.

MR. JUSTICE HARLAN delivered the opinion of the court.

There can be no doubt upon this record, confused though it be, as to the real nature of the present case.

The substantial facts are these: In December, 1890, one Sweet, claiming to be owner of certain town lots covered by a patent to him from the State of Texas, of date December 10, 1885, conveyed the same by deed (his wife uniting with him) to J. G. Bogard and other named persons. The lots were in the town of Mangum, which was in what is now Greer County, Oklahoma. The deed, which was recorded, was with warranty and absolute upon its face. On the same day, at the same time, a written agreement was entered into between, substantially, the same parties. That agreement referred in terms to the deed and bound the grantees therein to sell the lots, collect the proceeds of sale, and out of the gross receipts in cash received and collected on such sales, as soon as collected, pay over two-thirds to Sweet and his wife. The agree-

ment recites that Sweet had transferred to the other parties a large number of promissory notes, which Sweet had taken for purchase money due on certain town lots previously sold by him. Bogard and his associates by the agreement bound themselves to use due diligence to collect the notes, handing over to Sweet two-thirds of the amount collected on them.

The parties with whom Sweet made this arrangement were members of the Mangum Star Printing and Publishing Association, a partnership located at Mangum. The arrangement, evidenced by the deed and the agreement, had for its object the building up of that town, the parties, as stated, with whom Sweet contracted receiving, as compensation for their services, one-third on the sales of lots and a like proportion of the proceeds of any notes collected by them. There was no other consideration for the arrangement. The absolute title to the lots was put in Bogard and his associates for purposes of convenience, namely, that they might the more easily effect sales of the property. The situation was accurately described by the Supreme Court of the Territory of Oklahoma when it said: "The record discloses that at a date when Greer County was claimed to be a part of and under the jurisdiction of the State of Texas, H. C. Sweet purchased the land in controversy from that State, and while claiming the same under such title, platted it into town lots which became, and were at the time of the action, a part of the townsite of the city of Mangum. H. C. Sweet, desiring to aid in the upbuilding of a newspaper and the town generally, entered into a contract with the defendants in error, and others, to allow the plaintiffs in error to sell his townsite property, and to collect certain notes which he then had, for property by him theretofore sold, the understanding and agreement being that, in order to facilitate the business, the plaintiffs in error were to form a corporation for the purpose of running the newspaper and selling the real estate, it being agreed that the corporation should sell the property and collect the notes and pay to Sweet two-thirds of the amount of the sales and retain one-third thereof as their

commission. As a matter of convenience, in the carrying out of the contract, a deed was made by Sweet and wife to all of the property. Afterwards an attempt was made to form the corporation. There being no law in Texas under which such a corporation could be formed, that portion of the scheme failed, and, as shown by the record, the project was dropped by almost all, if not entirely all, of the parties connected therewith, and the deed, although recorded, was returned to Sweet, together with the notes."

As already indicated, at the time the above arrangement was made it was supposed by some that Greer County was part of the State of Texas. For many years, indeed, from the time of its admission into the Union, Texas asserted that Greer County was within its recognized limits. But subsequently, in a suit brought in this court by the United States against the State, it was adjudged that Greer County constituted no part of the State of Texas, but was under the exclusive jurisdiction of the United States. *United States* v. *Texas*, 162 U. S. (1895), 1, 90.

At a later date, January 18, 1897 (29 Stat. 490), Congress passed an act whereby grants of lands in Greer County could be obtained under the homestead law of the United States as modified by that act. Under that legislation Sweet, on October 13, 1898, obtained a patent from the United States and holds title under it.

The original scheme for the upbuilding of Mangum as outlined in the deed and agreement of 1890 failed and was wholly abandoned by the parties to those instruments, and the present suit was brought by Sweet and wife for the cancellation of the deed made to Bogard, and for a decree removing the cloud created by it upon the title to the property in question. The plaintiffs having died, after the institution of the suit, there was a revivor of the suit in the name of their children and heirs. Notwithstanding some of the parties to the original scheme defended the suit, a decree was rendered in accordance with the prayer of the plaintiffs, and that decree was affirmed

by the Supreme Court of the Territory of Oklahoma. 17 Oklahoma, 40.

Neither argument nor citation of authorities is necessary to establish the correctness of the decree below, and it is

Affirmed.

END OF CASE